

§ 2 The sovereignty of the state

- a central element of the very idea of the state

I. The sovereignty of the state as a consequence of the right to self-determination of peoples

- In the world order of states, every people is free to follow its own political & ideological ideas, giving effect to its own cultural & social characteristics in accordance with its own economic, geographical & civilisational conditions, within its own state order, which it is free to shape (→ right of peoples to self-determination).
 - This right is explicitly anchored in art. 1(1) ICCPR and ICESCR, but also reflected in art. 1(2) and 55 UN Charter and generally recognised as ius cogens customary international law.
- The world order of states does not seek to impose a specific political, economic or social system on all peoples, but *respects human diversity* and provides the institution of the state to live it. This is the reason why this world order is accepted worldwide across all divides.
 - In particular, there is *no obligation to introduce democracy or a market economy* in a state.
- This is realised through the concept of legal independence (= "sovereignty") of the state
 - which is linked to the state rather than to its people, yet serves to implement its people's right to self-determination.

II. The sovereignty of the state as a fundamental pillar of the world order of states that can only be changed or altered by global consensus

- A fundamental pillar on which there is a *broad consensus among mankind across all states*, and which is the premise for the understanding of all relations amongst states and between states and international institutions.
 - The consensus has *even grown in the process of decolonisation* after World War II, which has created numerous new states in the Global South that usually attach particular importance to their sovereignty.
- Any attempt to replace or alter the concept of sovereignty would amount to a fundamental change to the world order of states and therefore require the same broad worldwide consensus. Legally, this can only be achieved through a *global international treaty between all or almost all states* or through fundamental changes to the *ius cogens customary international law*.
 - It is not possible for a few avant-garde states (e.g. in Europe) to take this step on their own without the consensus of the others, as the legal foundations of the world order of states apply equally to all states on the planet.
 - Nor is it possible for legal scholars to simply "define away" the sovereignty of the state through academic publications, as changes to the world order of states require consensus amongst the states, not the scholars. Legal publications aiming in this direction belong to the realm of "academic utopia".

III. The essence of the sovereignty of the state

1) Definition of sovereignty

- Sovereignty is the *underived and independent legal capacity to act in internal and external affairs*, which is only subject to a few basic restrictions under customary public international law but otherwise *unlimited*.

2) The absoluteness of sovereignty

- Sovereignty is, *by its very nature, something absolute*: underived, independent, unlimited. This concept was lived for centuries. It is still upheld today, even though nowadays a few restrictions are acknowledged and states act in practice with little independence...
- The absoluteness of sovereignty entails its *indivisibility*. Something absolute cannot be split up without destroying it and therefore *cannot be shared*. Even in complex arrangements involving multiple vertically nested governing entities, such as a federal state or the

European Union, *only one* can enjoy sovereignty. Sovereignty can also not be in suspense, in transition or "in limbo". Even in the most complex constellations, it is *always possible and necessary to clearly assign sovereignty* to one level or the other.

3) Sovereignty of the state and within the state

- Sovereignty *of* the state (under public international law) must not be confused with sovereignty *within* the state (as discussed in political theory), which in a democratic state lies with the people.
 - Provisions on sovereignty in constitutions and intern. treaties must be interpreted with caution: To what kind of sovereignty do they refer?

4) The state's underived and independent legal capacity to act

- Due to its sovereignty, the state is by nature endowed with the *legal capacity to act* (power to take measures that are legally valid and binding) in all internal and external affairs.
 - The legal capacity to act does not necessarily mean the right to act in a certain way: It can include the legal power to take measures that are legally valid even if they are unlawful.
- This power is *underived*: not conferred on or delegated to the state by someone else.
- It is also *independent*: No one can abolish, suspend, limit or control it.
- It includes by nature the power to exercise public authority (public/sovereign power - rule by virtue of higher law) on the state territory. The state is the *only public institution* on the planet, *which exercises underived and independent public power*.
- In external affairs, it includes the power to conclude intern. treaties and accede to intern. organisations, but also to withdraw from them and to reject intern. partners.

5) The state's (quasi-) unlimited legal capacity to act

- Sovereignty endows the state with a comprehensive, (quasi-) unlimited legal capacity to act.
- For centuries, the dogma of the state's completely unlimited sovereignty prevailed (concept of absolute sovereignty).
- Nowadays, *a few basic restrictions* are recognised as *ius cogens* customary international law (concept of relative sovereignty). Measures that overstep these *inherent boundaries*, even provisions in the national constitution, are not covered by the state's legal capacity to act and thus invalid. Serious cases may even trigger a humanitarian intervention. However, apart from these few exceptions, sovereignty remains unlimited.
- Recognised boundaries:
 - prohibition of force against another state or preparations for that
 - no intern. agreements on a joint war of aggression against a third state
 - no constitutional mandates to occupy foreign states, annex foreign territory or reerect an empire
 - prohibition of slavery
 - no laws that introduce slavery or slavery-like exploitation as a legal institution
 - no laws that deny certain people legal personality
 - prohibition of genocide and ethnical cleansing
 - no laws that deprive members of ethnical minorities of all rights
 - no mass expropriations or mass deportations of members of ethnical minorities
 - no other huge-scale extreme human rights violations
 - e.g. no laws that deprive groups of persons (e.g. women in Afghanistan) of their basic rights and freedoms
 - problem: towards a global *ius cogens* ban on serious climate damage?
 - Does the Paris Agreement of 2015 (ratified by 193 of 197 states) express a global consensus on a general ban on state activities that cause or favour serious climate damage?
 - Which kinds of climate-damaging activities resp. related laws and policies might be banned in the globalised world?

IV. The far-reaching legal consequences of the sovereignty of the state

1) The state's (quasi-) unlimited public power

- Regardless of globalisation and the resulting de facto dependencies, the state retains a (quasi-) unlimited public power as long as it remains a state.
- The state may not have the right but does have the power to enact laws and take decisions in areas where it has delegated decision-making to international organisations, even if they do not comply with the legally binding decisions of that organisation.
- International institutions cannot acquire the power to declare domestic laws void against the firm express will of the state.
- This even applies in the European Union, even though its law enjoys primacy over the law of its member states. This primacy is only a primacy in application, not in validity, and can be suspended by the individual member state on its territory by a contrary legal act.
 - Such a move may trigger sanctions and, as a last resort, the expulsion of the member state, but in case of an ultimate conflict, the law of the member state will prevail.

2) The state's control over all other public power exercised on its territory

- In the world order of states, *state sovereignty is the source of all public power*. No public power can exist that does not flow from a state's act of will. There are governing entities on a lower or higher geographical level who also exercise public power (federated states, regions/provinces, counties/districts/kabupaten, communes, the EU etc.), but the existence of their public power presupposes the state's consent.
- Supranational public power, which is exercised by special intern. institutions on the territory of several states, requires a legal act of every concerned state that generally vests the supranational measures with binding force on the state's territory [innerstaatliche Bindungsanordnung]. This act can be revoked by the state at any time.
- Sub-national public power (on the regional and local level) is regulated in the laws of the state, often with guarantees in the constitution. The state may reorganise this system at any time, if necessary by amending the constitution. It can even eliminate a whole level (e.g. abolish the districts).
 - This also applies to federal states: The existence and public power of the federated states is only guaranteed under the federal constitution. The state can convert into a unitary state and eliminate the federated states by adopting a new national constitution.

3) The state's legal capacity to conclude international treaties in violation of other international law

- The state must not but can conclude treaties, join intern. organisations or forge alliances in violation of other obligations which it has already undertaken. Such steps will be legally valid.
 - Example: An EU member state can join the competing Eurasian Economic Union, although membership in both organisations is incompatible.
 - Example: A NATO member state can conclude a military assistance pact with Russia and even carry out joint military manoeuvres, even though Russia openly threatens NATO.

V. An inseparable political-philosophical consequence: the ultimate responsibility of the state

- Sovereignty comes along with the ultimate *responsibility* of the state towards its citizens *for the comprehensive fulfilment of all public functions on its territory*. This includes the final responsibility for the results - or missing results - of the activities of local and regional territorial collectivities and all kinds of international institutions on its territory.

fying, the state must reorganise the concerned sectors. This may include to associate with other states for more efficient fulfilment of certain tasks.

- If the state delegates tasks to international institutions, it keeps its ultimate responsibility. It must *account for delegating but also for not delegating tasks* and even for not creating stronger international institutions that may perform more efficiently.
 - For example, the ASEAN member states bear the ultimate responsibility for the weak performance of their poorly designed geo-regional organisation ASEAN.
- Likewise, the state must not only account for participating (→ EU member states) but also for not participating (→ UK, Switzerland, Norway, Iceland) in a process of geo-regional integration or for not supporting it more actively.
- Thus, the state's ultimate responsibility can cause it to participate in an *association of states* but also to leave it in order to join or create a better one.
- The state's ultimate responsibility may even prompt a smaller state that is notoriously overwhelmed by the challenges of our time to relinquish its own sovereignty and join a larger, more capable state (→ USA 1788 ff., Germany 1871, Europe in the 2040s?)

VI. Sovereignty and the constitution

- Sovereignty encompasses the *unlimited legal capacity for self-organisation*. The state shapes its institutions and political system at its own discretion. International partners cannot acquire the legal power to impose a certain internal organisation that the state rejects. Their means of influence are limited to conventional political, diplomatic and economic pressure.
- The state's free self-organisation includes the freedom to decide on its own constitution. The *power of the pouvoir constituant remains (quasi-)unlimited*, even in the 21st century under the conditions of globalisation.
 - For example, the state is still free to propagate isolationism and reject international cooperation in its constitution.
- However, the inherent boundaries of sovereignty under today's concept of relative sovereignty (→ supra, III.5) are also boundaries to the capacity to design the constitutional order. The power of the *pouvoir constituant* cannot extend beyond the legal power of the constituted state.
 - Example: Constitutional clauses that incite to annex foreign territory or perform ethnical cleansing, allow to introduce slavery or deny basic women's rights would be legally invalid under *ius cogens* customary law.