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The significance of borders : why representative government and the rule of law require Nation States

Baudet, T.H.P.

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Author: Baudet, Thierry Henri Philippe

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CHAPTER TWO

SOVEREIGNTY

2.1. INTRODUCTION

‘There exists perhaps no conception the meaning of which is more controversial than that of sovereignty’, wrote the renowned German-British jurist Lassa Oppenheim.¹ Indeed, in discussions on statehood the controversy frequently focuses on that particular word, sovereignty. Much debated and disputed, its usage has often been thought to be ‘inherently problematic’,² and sovereignty has been identified as ‘the most glittering and controversial notion in the history, doctrine and practice of public international law’.³ It is therefore not surprising that every now and then someone proposes to discard the word altogether. Louis Henkin writes, for instance:

Sovereignty is a bad word (...) it is often a catchword, a substitute for thinking and precision. (...) For legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era.⁴

As of today, however, sovereignty remains a key concept in the relations between states, as well as in the understanding of modern statehood. In this chapter, we will have a closer look at it.

The word ‘sovereignty’ finds its origin in the Middle-Latin *superanus*, which means ‘above’ or ‘elevated above others’.⁵ One of the oldest recordings of it is in a French charter, dated around 1000 AD, but the development into Early French, as *souverain*, is found from the twelfth century onwards – denoting geographical qualities of higher and lower,⁶ as in: mountain A is *souverain* over mountain B. The first record where the word ‘souverain’ was used in a political sense, was

¹ Lassa Oppenheim, *International law. A treatise*. 4th Edition by A.D. McNair (London: Longmans, 1928) 66.

² Roger Scruton, *The Palgrave Macmillan Dictionary of Political thought*. 3rd edition (London: Palgrave Macmillan, 2007).

³ H. Steinberger, ‘Sovereignty’, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law. Volume Four* (Amsterdam: Elsevier, 2000) 500.

⁴ L. Henkin, *International Law: Politics and values* (Dordrecht: Martinus Nijhoff Publishers, 1995) 9-10.

⁵ Gerard Kreijen, *State Failure, Sovereignty, and Effectiveness. Legal Lessons from the Decolonization of Sub-Saharan Africa* (Leiden: Martinus Nijhoff Publishers, 2004) 27.

⁶ Kreijen (2004) 27.

allegedly in the principal work of the French jurist Philippe de Beaumanoir,⁷ entitled *les Coutumes de Beauvaisis*, in which he wrote that ‘chacuns barons est souverains en sa baronie ...’⁸ – every baron is the highest in his own barony. From then on, ‘sovereignty’ is more often recorded as meaning ‘there is no higher political power’ over a political unit.

But it is exactly this principle of ‘no higher power’ that causes confusion. For it may refer to external relations, establishing a rule of non-intervention; but it also implies that internally, the sovereign has effectively established himself as the highest power. In order to have an effective ‘community of sovereign states’ – in order for external sovereignty to make sense –, it is self-evidently necessary that those sovereign entities actually exercise effective governmental control over their territory. One cannot do business with sovereigns if they cannot enforce agreements at home.

A discussion of sovereignty therefore inevitably leads to an analysis of the internal qualities of the modern state. Indeed, sovereignty and statehood are inextricably linked, doubling the complexity of the picture. There can be no international system of sovereign entities, without those entities possessing the effective governmental control associated with statehood.

The general consensus is that four criteria determine sovereign statehood. The first and most important criterion was already mentioned, which is the exercise of ‘effective and independent governmental control’ (1). This implies a ‘population’ (2), and a ‘territory’ (3), culminating in what is generally referred to as ‘internal sovereignty’.

But then, there is the international component to sovereignty. This is ‘the capacity to enter into relations with other states’ (4),⁹ and is encapsulated in the notion of external sovereignty. External sovereignty leads to questions over recognition and legitimacy that we will have a closer look at further down. But first we will examine the meaning and scope of ‘internal sovereignty’.¹⁰

⁷ Philippe de Rémi, sire de Beaumanoir lived presumably from 1247 until 1296. He was a French administrative official and nobleman. His main work is *Coutumes de Beauvaisis*, written in 1283, and printed in 1690.

⁸ Kreijen (2004) 28.

⁹ Pierre-Marie Dupuy, *Droit International Public* (Paris: Editions Dalloz-Sirey, 1992) 23: ‘une population (...) que l’état stabilise à l’intérieur de ses limites; c’est ainsi qu’à l’époque contemporaine, l’idée d’un Etat nomade est définitivement abolie’; Joe Verhoeven, *Droit International Public* (Louvain: Larcier 2000) 52ff; Malcolm D. Evans (ed.), *International Law* (Oxford: University Press, 2003) 217ff.

¹⁰ For a classic definition in international legal discourse, see the case of the Permanent Court of International Law, in the Lighthouses on Creta and Samos case, available online at http://www.worldcourts.com/pcij/eng/decisions/1937.10.08_lighthouses.htm; for a discussion of its terms, see Pablo Mendes de Leon, *Cabotage in International Air Transport Regulation* (PhD thesis, Leiden University Press, 1992) 162. See also the 1949 Corfu Channel Case of the ICJ, judgment of April 9th, 1949. Available online at <http://www.icj-cij.org/docket/files/1/1645.pdf>. Cf. J.W. Rees, *The*

2.2. INTERNAL SOVEREIGNTY

As said, internal sovereignty consists in the exercise of effective and independent governmental control, over a population, on a generally marked-out territory. The most problematic aspect of this is the first criterion: effective and independent governmental control. Questions related to defining a population and a territory, more importantly, are outside the remit of this chapter and will therefore not be taken into account.

We will thus focus on effective and independent governmental control. The first thing that may come to mind when discussing this is Albert Venn Dicey's famous definition of parliamentary sovereignty. Parliament, as the highest institution of a state, embodies sovereignty when any of its acts, '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.'¹¹ Dicey continues:

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.'¹²

In Dicey's definition, however, there is no mention being made of existing power realities on the ground; his understanding of sovereignty is institutional. What will actually happen with verdicts of the courts – whether their magistrates have any bearing on the population or not – is not part of his concern. This leaves Dicey's definition open to the obvious objection that while parliament and courts may officially be fully sovereign, effective governmental *control* may be entirely lacking.¹³

Now, governments are often incapable of enforcing compliance with all their laws, and sometimes incapable of enforcing most of them. Courts may be unable to make sure that judgments are actually carried out. The most extreme examples of this are formed by a number of mostly post-colonial (predominantly African) states that have not succeeded in enforcing their laws and maintaining order within their territory. These states have, in recent years, come to be called 'failed states', rendering the notion of sovereignty in Dicey's institutional sense a dead letter.¹⁴

theory of sovereignty restated, in: Peter Laslett (ed.), *Philosophy, Politics and Society*. First series (Oxford: Oxford University Press, 1975).

¹¹ Albert Venn Dicey, *Introduction to the study of the law of the constitution* (London: Macmillan, 1939) 40.

¹² Dicey (1939) 40.

¹³ As Dicey himself acknowledges as well. Dicey (1939) 82ff.

¹⁴ Cf. Kreijen (2004).

That is why Dicey's understanding of sovereignty in fact already presupposes effective governmental control. His approach helps to locate, within the governmental structure, the ultimate sovereign point. But he does not define what it is that constitutes effective governmental control itself.

Another definition of sovereignty that may therefore be considered, is the definition provided by Black's famous *Law Dictionary*. According to this work, sovereignty is to be understood as the 'supreme political authority'.¹⁵ For several reasons, however, this definition is also problematic.

For the word 'authority' can mean two things. Authority may refer to the individual or the institution that has the power of decision in a given dispute (call it authority-1). The umpire of a tennis game, for instance, may be identified as the 'authority' in determining whether a ball was in or out. A teacher is the 'authority' in the classroom. One may point at the police as the 'authority' on the streets (the examples are endless). In that sense, authority (as authority-1) is relative to the power to decide or to act.

However, authority also refers to a feeling of respect or esteem that people may feel for others (call it authority-2). In this sense, the Pope may be identified by Catholics as an 'authority' in religious matters.¹⁶ Or the Dalai Lama may be regarded as an 'authority' in practical ethics. Both could lose their 'authority' – as authority-2 – over their followers if they were seen to make wrong decisions. For instance, the sex abuse scandals of 2009 within the Catholic Church have affected the 'authority' of the Pope. In 2008, the Dalai Lama was criticized in an article in *The Guardian* that posed the question whether 'there [has] ever been a political figure more ridiculous than the Dalai Lama.' In the article, the Buddhist leader was reproached for being 'a product of the crushing feudalism of archaic, pre-modern Tibet, where an elite of Buddhist monks treated the masses as serfs and ruthlessly punished them if they stepped out of line.'¹⁷ This, if true, might cause his 'authority' over his admirers to diminish.

¹⁵ Bryan A. Garner (ed.), *Black's Law Dictionary*, 8th edition (Los Angeles: West Group, 2004) 1430, and Scruton, *Dictionary* (2007) 655.

¹⁶ Of course, the Vatican has a long history of claiming political sovereignty as well, apart from moral or religious 'authority'. As indeed happened with the *Regnans in Excelsis* bull of 1570, which 'released' all the subjects of Queen Elizabeth of England from their allegiance to her. As will be argued below, states confronted with such rival claims would not lose their sovereignty, as long as they maintain effective control. It is clear that Richelieu, when declaring that in matters of state, no French catholic should prefer a Spaniard to a Huguenot, took position against the idea of papal sovereignty, too. This contrasts sharply with the lack of such a strong defense of territorial sovereignty amongst present-day political elites, for instance after Khomeini issued a fatwa with universal validity for all Muslims to assassinate Salman Rushdie, in 1989. Cf. Cliteur (2007).

¹⁷ Brendan O'Neill, 'Down with the Dalai Lama. Why do western commentators idolise a celebrity monk who hangs out with Sharon Stone and once guest-edited French Vogue?', in: *The Guardian*, May 29th, 2008.

Now, the complexity commences as such 'authority' in the sense of being respected or held in high esteem (authority-2) may also be vested in the umpire, the teacher and the policeman. If the umpire is suspected of being biased against one of the players; or if the teacher appears not to know the matter he is teaching; or if the policeman beats up or arbitrarily arrests an innocent civilian; in such cases their authority in the sense of being respected or held in high esteem (authority-2) may crumble. Nevertheless, their authority as agents endowed with the power to make decisions or to act (authority-1), is not affected. The authority in the sense of the 'right to decide' (authority-1) of the umpire, the teacher or the policeman is not dependent on the recognition of their authority in the sense of being respected (authority-2) by those subjected to their power. The tennis player who feels wronged may submit a complaint, the students may write to the school board, or the citizen may sue the police officer – but whether their complaints will affect the authority-1 of the umpire, the teacher or the policeman, is not up to them.

This applies to sovereignty generally as well. Naturally, it is very difficult to imagine a state that does not have any authority in the sense of being respected (authority-2) by its population. Effective governmental control is extremely difficult to maintain without the consent of at least part of the population. Even dictatorships have a need for a loyal class of *custodes* to carry out orders and support the regime. Moreover, in rare cases only have governments possessed the ability to directly intervene with all matters happening on their territory, usually rendering them dependent on benevolent cooperation by other institutions and groups.

However, should governments rule unjustly and undermine their 'authority' in the sense of being respected or held in high esteem (authority-2), they would nevertheless retain their 'right to decide' (authority-1) as long as they maintained effective control.

This confusion that Black's definition of sovereignty gives rise to, stemming from the semantic ambiguity of the word 'authority', is perhaps overcome through the claim by the legal positivist John Austin that the sovereign is the one or the institution whose 'commands are habitually obeyed'. Though we could again dispute over the several ways in which 'habitually' could be understood, this definition is less ambiguous. Yet we could also accept Black's definition of sovereignty as the 'ultimate authority' if authority is understood as authority-1: the ultimate power to decide.

To identify the sovereign as such, however, must mean that our understanding of internal sovereignty is not connected to any considerations of natural law. The eternal question whether unjust laws can still be properly called 'laws' – and whether unjust government can still be properly called 'government' – is beside the point when trying to identify effective and independent governmental

control.¹⁸ For whichever normative position one chooses to defend in this debate, it is irrelevant if the internal sovereign's commands continue to be habitually obeyed (when it comes to external sovereignty, by contrast, our assessment of the relevance of this debate may turn out differently, as will be discussed in the next paragraph).

In establishing obedience to its commands, then, as Max Weber argued, the sovereign must monopolize the use of force. In *Wirtschaft und Gesellschaft* (1922), he analyzed that

A compulsory political organization with continuous operations will be called a 'state' insofar as its administrative staff successfully upholds the claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order.¹⁹

The use of the word 'legitimate' again confronts us with the confusing double meaning also encountered in the word 'authority'. Legitimacy may mean 'in accordance with its own rules' (call it legitimacy-1), or it may mean 'being experienced as rightful' (call it legitimacy-2). It is to legitimacy-1 that Weber intended to refer to, when identifying the monopoly to the use of force in this case.²⁰ This means that it is not relevant for the existence of a state whether the force is experienced as 'rightful', but only whether the rules laid down permit it.

This also means, ultimately, that there is no conceptual difference between a state and a concentration camp. The guards and rulers of the camp form a government, and the prisoners a population. In such a concentration camp case, then, the guards have a monopoly to the use of force *in accordance with the rules laid down by themselves* (but may be bound by certain limitations too, in which case the concentration camp has an element of the rule of law – see chapter 6). When a fight breaks out between two prisoners, for example over

¹⁸ Thomas Aquinas was already occupied with this problem in his quaestiones, most notably the quaestiones 90-95 of the *Summa Theologiae* (1265), and it was famously taken up once again by Hart and Dworkin in the 20th century. Indeed, as one scholar describes it: 'For the past four decades, Anglo-American legal philosophy has been preoccupied – some might say obsessed – with something called the "Hart-Dworkin" debate', the core question of which seems to be the relationship between law and morality – and the question of the extent to which unjust laws are still proper 'laws'. Steven J. Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed', *University of Michigan Public Law Working Paper No. 77* (February 2, 2007). Available online at <http://ssrn.com/abstract=968657>.

¹⁹ Max Weber, *Economy and Society. An outline of interpretive sociology*. Edited by Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978) 54 (§ 17). The original German text reads: 'Staat soll ein politischer Anstaltsbetrieb heißen, wenn und insoweit sein Verwaltungsstab erfolgreich das *Monopol legitimen* physischen Zwanges für die Durchführung der Ordnungen in Anspruch nimmt'. Max Weber, *Wirtschaft und Gesellschaft, Grundriss der Verstehenden Soziologie*. Studienausgabe herausgegeben von Johannes Winckelmann. Band I (Köln & Berlin: Kiepenheuer & Witsch, 1964) 36 (§ 17).

²⁰ Cf. Weber (1978) 56: 'the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it'. Weber's strict empiricism has often been discussed (and criticized), for example by Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953).

food, they have no right to use force against one another, unless this is explicitly permitted by the rules of the camp (as modern states for instance usually allow some form of self-defense). If the camp guards fail to suppress the use of force by the prisoners effectively, some prisoners may come to develop a parallel power center, challenging the power of the guards. It may come to be that the one whose orders are habitually obeyed over time becomes the leader of a gang of prisoners, if the guards continue to fail to take effective action. Ultimately, such a situation could result in a revolt, which is the same as a 'civil war'.

At such a moment, the internal sovereign becomes divided. The situation in Libya in 2011 exemplified this. Colonel Khadafi, who had ruled the country for several decades and had maintained a strong autocratic rule, was challenged by rebels from the East of the country. After some Western military support, the rebels managed to establish a power base around Benghazi, effectively upholding a new sovereign power (again, this has consequences for external sovereignty as well, as will be discussed below). By contrast, as long as failure of the guards or the state to monopolize the use of force remain exceptions, and their commands thus continue to be habitually obeyed, the internal sovereignty continues to reside with them.²¹

Black's definition of sovereignty also contained the word 'political', as in: 'supreme political authority'. This refers to the power of the state as the ultimate expression of the government of the polity. But it puts us on track of at least three problems related to internal sovereignty. The first is that most states at present have decentralized many governing and legislative tasks; the second is that they have some separation of powers; and the third is that they have committed themselves to supranational organizations; the word 'political' in our definition of internal sovereignty as 'supreme political authority' therefore leads to new confusions; however, as we shall see, it also provides the umbrella concept that enables us to solve these problems.

Let us first address the decentralization of governing and legislative tasks. Most states have, to some extent, decentralized governing and legislative tasks, and therefore, the central – 'sovereign' – government often does not possess all the means to govern as it may please.

The most striking example of such decentralization is perhaps a federation such as the United States, where powers not delegated to the federal government are 'reserved to the states respectively or to the people' (Amendment 10). Some have argued that the whole concept of sovereignty is for this reason altogether fraudulent. Should this be the case, then indeed, supranationalism would not be at odds with the state at all, but rather present an additional layer of governance,

²¹ See also: Maurice Joly, *Dialogue aux enfers entre Machiavel et Montesquieu ou la politique de Machiavel au XIXe siècle* (Bruxelles, A. Mertens, 1865).

not fundamentally different from the already existing layers such as county, state, province or municipality.²²

At first sight, this view may seem attractive. However, whether we deal with a unitary or a federal state, however different these two types of states may be,²³ and regardless of how many governing tasks may reside within the member states of a federal union, a number of fundamental attributes of statehood are always – and necessarily so – centralized. These are the ultimate command over the army, and the common defense of borders. This has consequences for external sovereignty too, as will be discussed below, because common defense of borders implies the common conduct of foreign affairs.

Ultimate command over the army, moreover, requires the capacity to pay for it, and therefore implies the final say of the central government in (some of) the taxes to be paid as well. There exists no state, as logically there *cannot* exist a state, neither unitary nor federal, in which the command over the army is not centralized, and connected with that the conduct of foreign relations and the administration of (some of the) taxes. This is illustrated by confederacies.

A confederacy is nothing more than an organized structure of unenforceable cooperation between sovereign states. Even the United Nations (the Security Council not taken into account) could be denoted as such: a form of cooperation between states, which ultimately cannot enforce anything. A confederacy can never be a state, which is why a ‘confederate state’ is a contradiction in terms (and why, for instance, the American confederacy was denoted as ‘Confederate States’ in the plural). Another typical example of a confederacy is the Republic of the Seven United Provinces, which existed between 1581 and 1795. In this political structure, the seven provinces deliberated on matters of common interest, most importantly their common defense, yet all of them retained the right to veto every proposal for collective action, and the central deliberative body, the Estates General, had no direct legislative powers over the citizens of the seven provinces. Moreover, the provinces retained a right to withdraw, and

²² Cf. W.J.M. Mackenzie, and B. Chapman, ‘Federalism and Regionalism. A Note on the Italian Constitution of 1948’, in: *The Modern Law Review*, Vol. 14, No. 2 (Apr., 1951) 182-194. See also Part II, *Introduction*.

²³ In unitary states all decentralized (local or regional) administrative units derive their powers from the central sovereign authority, which ultimately holds the power to retain them. In these types of states the decentralized competencies are typically enacted in a centralized law which the centralized legislative is capable of broadening or narrowing. In a federal state, on the contrary, the central sovereign power recognizes that the decentralized administrative entities (usually indicated as ‘states’) have their own fields of competence that the federal government has no right to interfere in. The invention of this type of state is typically associated with the summer of 1787 when the representatives of the thirteen former colonies gathered in Philadelphia to found the United States.

no common direct taxation existed.²⁴ Thus, the variation of decentralization is not infinite. A state ceases to exist if it decentralizes or devolves the fundamental attributes necessary for ultimate control.²⁵

There is also another reason why the argument that supranationalism is just another layer on an already layered structure of the state, is untenable. For the rationales of centralization and decentralization are completely opposed. To devolve governing and legislative tasks to a *lower* level, enabling the different regions within a state to choose different arrangements, is not the same as to transfer those tasks to a *higher* level, effectively compelling the different regions to accept uniform arrangements. Precisely why decentralization exists, namely to distinguish legitimate state rule on fundamental activities, from fields of minor importance, is denied by supranationalism; the logic of decentralization is diversity, while that of centralization is uniformity. The larger the centralizing unit, the more oppressive the uniformity will be.²⁶

In addition to the problems posed by decentralization, there is a second problem related to internal sovereignty: the separation of powers. No constitutional democracy at present has a monarch whose powers even remotely resemble those Jean Bodin or Thomas Hobbes envisaged for the head of state. This means that the single sovereign individual or institution, not only symbolizing the whole of the state, but actually acting as its only ultimate agent, may not even exist. As Mackenzie and Chapman write:

There may be a constitutional division of functions between legislature, executive and judiciary: or between central legislature and local legislatures: or there may (as in the U.S.A.) be both divisions. In such cases one may be puzzled to say where true sovereignty lies: does it lie with 'We, the people of the United States' or with 'we, the nine old men of the Supreme Court'?²⁷

If sovereignty in modern states, then, is in practice 'divided' amongst three branches of government, what meaning does it still have? Where is sovereignty ultimately to be found?²⁸

In most states, a division of powers indeed exists, and since these powers cannot be reduced to one another, it is sometimes argued that there is no central

²⁴ See for instance M. Huizer, *Hoofd en hoogste overheid. De soevereiniteit in Nederland sinds 1543* (Amsterdam: J.M. Meulenhoff, 1967) and Ernst Kossmann, 'Soevereiniteit in de Zeven Verenigde Provinciën', in: *Theoretische Geschiedenis*, vol. 18, issue 4 (dec. 1991) 413-422. For a comparative perspective: T.F.X. Noble et al. (1998) 558.

²⁵ This is also why the 'Confoederatio Helvetica' – i.e. Switzerland – is really not a Helvetic confederation but a federation.

²⁶ As discussed in chapter 1, section 2, this applies to the state itself as well. States are compromises.

²⁷ Mackenzie and Chapman, 'Federalism and Regionalism. A Note on the Italian Constitution of 1948', in: *The Modern Law Review*, Vol. 14, No. 2 (Apr., 1951) 182-194.

²⁸ This discussion was also touched upon in the previous paragraph.

sovereignty anyway. This could mean that it does not matter anymore where for instance the judiciary is located (in- or outside the state): separation is separation.

This was the argument that Carl Schmitt disagreed with by stating that sovereignty lies with that person or institution that has the power to bring about the state of exception which even in federations lies with the federal executive.²⁹ Whichever view one takes on the question of where exactly the essence of statehood (i.e. 'sovereignty') is to be located, separation of powers is always much more a dialectic of powers than truly a separation. While it is true that three separate 'functions' of the state can be discerned, the executive, the legislative and the judiciary are never strictly divided among the different organs of the state. Many legislative tasks reside with the executive (and the immense bureaucratic apparatus presently at its disposal), while modern parliaments primarily form a check on the power of the executive. Parliaments are sometimes burdened with some judicial tasks as well, for example trying members of the executive. Moreover, the members of the judicial branch are usually appointed by the executive or by parliament. They are expected to be nationals of the state, and can be held in check by the national legislator if their interpretation of the law is felt to exceed its intended margins.

Internal sovereignty consists in the exercise of all these functions.³⁰ To remove one of these functions from the state, as is done for instance through 'human rights courts', is to remove it from the control of the other powers and so to upset the established balance.³¹ Moreover, the three powers recognized by Montesquieu cannot decide differently on any single issue. In that sense, they are inextricably linked, and such a linkage can only harmoniously continue where there is a similarity of cultural and historical assumptions.³² Therefore, those

²⁹ 'Souverän ist, wer über den Ausnahmezustand entscheidet'. Carl Schmitt, *Politische Theologie, Vier Kapitel zur lehre von der Souveränität* (München und Leipzig: Verlag von Duncker & Humboldt, 1934) 1.

³⁰ As Laughland writes, when discussing H.L.A. Hart's understanding of sovereignty (who in turn drew on John Austin): 'If there were legal limits on a sovereign's power, then he would not be a sovereign. This is not to say, of course, that a government cannot be subject to the law as laid down in the courts. On the contrary, a state may well have such mechanisms as part of its constitution, and no doubt this is a desirable thing. But sovereignty is not an attribute of one body within a state but instead of the state as a whole. The theory of sovereignty does not state at what level – national or international – nor in what form – dictatorial or democratic – it is desirable to embody sovereignty: it simply states that the buck always stops somewhere', in: John Laughland, *A History of political trials. From Charles I to Saddam Hussein* (Oxford: Peter Lang, 2008) 27.

³¹ Many commentators have suggested that a fourth branch of government power exists: the power of the public opinion. This will be discussed in Part II and Part III, where it will be argued that on the supranational level, public opinions cannot really exercise this power – at least not to the extent that they can do this at the national level.

³² A clear example of how the judicial branch can clash with the other branches of government is the *Dred Scott v. Sandford* case of the United States Supreme Court of 1857. In this case, the Supreme Court, dominated, as Robert Bork notes, 'by Southerners', ruled that the Missouri Compromise of 1820, in which it was determined that new States would not allow slavery, was

who demand that a single sovereign point be indicated before they are prepared to accept that such a thing as sovereign statehood exists, would probably be best contented with Schmitt's definition of it as the one who ultimately decides on the state of exception and thus commands the army (which leads us back to effective governmental control).

But what then of already existing supranational entanglements, one may ask, do they make the states that are part of them, less sovereign? States became members of them out of their free will – and could withdraw from them if they so wished. How could those organizations then be an infringement of their sovereignty? I will try to find my way out of this dilemma by distinguishing two meanings of the word sovereignty: a formal or 'ultimate' meaning, and a material or 'practical' meaning.

The first, the *formal* meaning of sovereignty, denotes the constitutional independence of a state. The power of supranational organizations is ultimately based on their recognition by the national member states, which retain their right to withdraw and thereby retain their ultimate, 'formal' sovereignty. The second, the *material* meaning of sovereignty, denotes the location where political decisions are being taken. Though not sovereign in the ultimate, 'formal' sense, supranational organizations have acquired a significant amount of this second, 'material' sovereignty.

Take as an example of this distinction the articles 93 and 94 of the Dutch constitution, which concern the direct effect of international treaties on Dutch law. Article 93 reads:

Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.

And article 94 reads:

Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.³³

These articles declare the supranational obligations of the Netherlands superior to the national law, thus limiting the *material* or practical sovereignty of the Dutch parliament. Nevertheless, the Dutch parliament retains the ultimate sovereign right to scrap or amend these articles of the constitution, to cancel treaties, or

a violation of the Constitutional right to have property (following from the 5th Amendment). As Bork notes, 'There is something wrong, as somebody has said, with a judicial power that can produce a decision it takes a civil war to overturn'. Robert Bork, *The Tempting of America. The political seduction of the Law* (New York: The Free Press, 1990) 28-34.

³³ Text taken from the official translation of the Dutch constitution, to be found on the website of the Ministry of Foreign Affairs, www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf.

to withdraw from supranational organizations, and so annul the international obligations of the Netherlands. Hence, the *formal* or ultimate sovereignty continues to repose with parliament. Formally, the Netherlands remain entirely sovereign, and would only cease to be so if the country lost its power to withdraw from the supranational organizations of which it is a member, or, what amounts to the same thing, loses its right to abolish or amend those articles that declare international obligations superior to national considerations.

This formal or ultimate sovereignty is what people refer to when they say that sovereignty is by its nature indivisible. When John Laughland for example writes that ‘the theory of sovereignty (...) simply states that the buck always stops somewhere’,³⁴ he means this formal sovereignty. This kind of sovereignty is indeed like being pregnant: there is no intermediate stage possible. Either a state has the right to withdraw from treaties, or it does not have that right. Either parliament may amend the relevant constitutional commitments, or it may not.

As implied, however, in the previous example, to recognize that sovereignty (in the formal or ultimate sense) is by nature indivisible is not to say that states cannot engage in far-reaching teamwork. It should only be noted that a state will not cease to be sovereign until it loses its right to resign from its supranational entanglements. This was ultimately the question that the American civil war (1861-1865) was fought over, when the southern American states attempted to secede from the union.³⁵ The Southern American states fought for their formal or ultimate sovereignty – their right to withdraw from entanglements –, but did not succeed.

Indeed, if, as a sovereign political unit, a state decides to coordinate parts of its government’s policy (for example its trade tariffs) with those of other states, this can result in close cooperation. A state may even become a member of an institution that may, by majority vote, decide upon the policy to be followed by its members (in this case, the permitted trade tariffs), without losing its sovereignty as such, understood in the formal or ultimate sense.³⁶ There is, however, still a fundamental difference between these two situations; between treaties between states as such, and an international body deciding by majority vote on policy regulations for its members. They are not exactly the same thing. And that brings us to sovereignty in the material or practical sense.

For while formal or ultimate sovereignty is the principal authority from which, in the last resort, all powers derive, and is, indeed by definition, indivisible, material or practical sovereignty is the competency to decide *as long and*

³⁴ Laughland (2008) 27.

³⁵ The very fact is illustrated by the different names for the war: the south called it the ‘war between the states’, the north called it the ‘civil war’.

³⁶ ‘In the last resort, the US might walk away from the WTO. That is an ultimate safeguard of sovereignty ...’. Rabkin (2007) 228.

as far as the ultimate sovereign permits it. Thus material or practical sovereignty is there, where the political process is happening – which can be very much divided between organizations. When a state is a member of a supranational institution, apart from the question of its right to withdraw from it, it is, as long as it is a member of that organization, bound by its decisions, even to those with which it may not agree. Though in the formal or ultimate sense, the member state is sovereign as it may still withdraw, as long as it has not done so it has lost elements of its material or practical sovereignty. This distinction is important for the rest of this book, and it will return later on.

2.3. EXTERNAL SOVEREIGNTY

This chapter opened with the observation that part of the reason why sovereignty is such a controversial concept is the fact that internal and external sovereignty are inextricably linked. External sovereignty – the acceptance of a state by others – is linked with the question whether that state successfully upholds internal sovereignty. Whether or not internal sovereignty is successfully upheld, moreover, may be disputed. States may deny an entity its external sovereignty, as many Arab states do with Israel, for instance; they may also grant external sovereignty to new entities, as happened with Kosovo in 2009.

This brings us to the fourth criterion for statehood, which is ‘the capacity to enter into relations with other states’. On this subject, two different approaches exist. The descriptive or declarative or realist, and the normative or constitutive or idealist.

The descriptive (or ‘declarative’ or ‘realist’) view starts from the observation that when an organization succeeds in establishing internal sovereignty, it has gained a *de facto* capacity to enter into relations with other states. This *de facto* capacity is then viewed as the only criterion in international law, and so the entity is viewed as a sovereign state. You do business with whomever you can make deals with.

This approach echoes the authority as-the-power-to-make-rules (authority-1) approach that we associated in the previous section with Austin and Weber.³⁷ No matter how wildly unjust the rule of that organization may be or by what ruthless acts of aggression territorial control has been realized, once this effective control has been established, we can speak of a state, period. The descriptive approach thus focuses on effectiveness.³⁸

³⁷ Weber (1964) 36.

³⁸ Cf. James Crawford, *The Creation of States in International Law*. Second Edition (Clarendon Press, Oxford, 2006).

The normative (or 'constitutive' or 'idealist') view, by contrast, holds that the capacity to enter into relations with other states is dependent on the general recognition by those other states, and that therefore, sovereignty is dependent upon a significant number of other states recognizing one as such. It is typically associated with the Congress of Vienna of 1814-5, where the great powers determined what entities would be granted the status of statehood in post-Napoleonic Europe, despite demands of many more regions and groups to be recognized as such at the time.³⁹ The normative approach takes the international community's recognition of a political entity as a state as the ultimate test, regardless of existing aspirations or even power realities on the ground. It thus focuses on legitimacy (to be granted or withheld by 'the international community'), not on effectiveness.

Carl Schmitt may be identified as a primary defender of the descriptive approach; Hans Kelsen as a defender of the normative approach.⁴⁰ While Schmitt stressed the fact that norms cannot enforce anything by themselves, and that thus, ultimately, power determined the order of things; Kelsen concluded that 'sein' did not say anything about 'sollen': whatever *was* the case, according to Kelsen, could never determine what *ought* to be the case – and law was the realm of *ought*, not of *is*.⁴¹ Kelsen argued that Schmitt's approach was not 'realist' but 'apologist', because it assumed that, in the words of Martti Koskenniemi, 'might makes right'.⁴²

In practice, these two views are brought into play in turns, depending at least partly on the political interests that are served by them; when they can, states may prefer to act by the normative approach, but ultimately, legitimacy always follows power and the descriptive approach is indeed the more 'realist', the constitutive the more 'idealist' – a luxury states cannot always afford.⁴³

A good example of how ambivalent states have been in their choice for either of these two approaches is the declaration drafted at the International Conference on Rights and Duties of States at Montevideo (Uruguay) in 1933.

³⁹ Cf. Adam Zamoyski, *Rites of Peace. The fall of Napoleon & The Congress of Vienna* (London: Harper Perennial, 2007) xiii: 'The Congress of Vienna (...) determined which nations were to have a political existence over the next hundred years and which were not ...'; also: N. Rosenkrantz, *Journal du Congrès de Vienne 1814-1815* (Copenhagen: G.E.C. Gad, 1953).

⁴⁰ Cf. Martti Koskenniemi, *From Apology to Utopia. The structure of international legal argument* (Cambridge: Cambridge University Press 2005) ch. 1 and 4.

⁴¹ Kelsen defended a strict monism between the national legal order and the international order. In other words: international law formed an integral part of national law, in his view. Cf. Hans Kelsen, 'Sovereignty and International Law', in: *The Georgetown Law Journal*, vol. 48 (1960) 637.

⁴² Koskenniemi (2005) 227. An insightful account of the debate between Schmitt and Kelsen can be found in Geliijn Molier, 'De soevereine staat en het internationaal recht', in: Geliijn Molier and Timo Slootweg (eds.), *Sovereiniteit en Recht, rechtsfilosofische beschouwingen* (Den Haag: Boom Juridische Uitgevers, 2009) 140ff.

⁴³ Cf. Robert Kagan, *Of Paradise and Power. America and Europe in the New World Order* (New York: Alfred A. Knopf, 2003).

After reconfirming the three criteria for internal sovereignty (or statehood) in the first article (effective control, territory, people), article 3 of the declaration reads: 'the political existence of the state is independent of recognition by the other states.'⁴⁴ Article 8 seems consistent with this descriptive approach: 'No state has the right to intervene in the internal or external affairs of another.' Yet article 11 then reads:

The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.

Thus article 11 establishes the legitimacy of the status quo at that specific moment in time, while, in an apparent contradiction, articles 3 and 8 seem to give both to minorities within states as to states themselves the freedoms respectively to declare their own state or to adjust their borders according to their own assessment of what their 'external affairs' demand from them.

An example of policy based on such normative ideas as expressed by article 11 of the Montevideo declaration, is the memorandum that the American Secretary of State Henry Stimson had written to India and China in 1931 stating that the United States would not recognize international territorial changes that were brought about through force (thereby implying support for India and China against rising Japanese imperial threats).⁴⁵ An example of policy based on realist ideas expressed by article 8 is the seizure by the United States of several former Axis territories following the end of the Second World War, such as the Ryukyu Islands off the Japanese coast.

Another example of the normative policy of the kind endorsed by article 11 is the message that the United States, with eighteen other (Latin) American states, sent to the governments of Bolivia and Paraguay in August 1932, when hostilities over their (i.e. the Bolivian and Paraguayan) border dispute concerning the Chaco region were increasing. The message contained the following passage:

The American nations further declare that they will not recognize any territorial arrangement of this controversy which has not been obtained by peaceful means

⁴⁴ Rights and duties of Statehood, Montevideo convention 1933. Available online at http://avalon.law.yale.edu/20th_century/intamo3.asp.

⁴⁵ This memorandum turned out to be the starting point of what would become the 'Stimson doctrine', see on this: Kisaburo Yokota, 'The Recent Development of the Stimson Doctrine', in: *Pacific Affairs*, Vol. 8, No. 2 (June, 1935) 133-143.

nor the validity of the territorial acquisitions which may be obtained through occupation or conquest by force of arms.⁴⁶

Yet when a cease-fire in 1935 brought an end to the full-blown war into which Bolivia and Paraguay, despite American attempts to downplay the conflict, had entered, and most of the disputed *Chaco boreal* region was awarded to Paraguay, the United States supported the 1938 truce confirming this new division of land.⁴⁷ Again political realities rather than high principles determined the choice of either approach. When this truce was finally confirmed in a treaty signed in April 2009, the United States was present as one of the guarantors of the new borders.

Many more examples could be given of how descriptive and normative approaches are brought into play in turns, depending on political opportunity. Northern Cyprus forms a recent case in which the normative approach seems to have prevailed. The region declared its independence from Cyprus proper in 1983 and has since – with the strong support of Turkey – realized effective governmental control. Even though Northern Cyprus has now been a *de facto* state for almost 30 years, the fact that it originated from a violent *coup d'état* (as well as the fact of Greek-Turkish animosity and Greece's power as a member of the EU) still stands in the way of recognition by other states, and Turkey is the only state to have recognized Northern Cyprus to this day. When Kosovo declared itself independent from Serbia in 2008, however, it was instantaneously recognized by most Western states. Yet when later that same year the provinces South Ossetia and Abkhazia declared independence from Georgia, their independence was met with skepticism and recognitions were not forthcoming.⁴⁸

Thus, there is no general rule as to how the fourth criterion for sovereign statehood – the capacity to enter into external relations – is to be interpreted, and as a result, it is interpreted according to political interests. Indeed, the distinction between the descriptive and the normative approach is more of theoretical than of practical relevance. For in practice, international recognition will always follow power. As long as disputes are still not settled, states may uphold principles of legitimacy to press for their desired outcome of the conflict; but when they are settled, and principle becomes a denial of reality, states will, ultimately, always

⁴⁶ Yokota (1935) 133–143. Yokota is right to write: 'Like its predecessors, however, the Chaco note, in so far as it does not represent a formal treaty among States, cannot be regarded as possessing the force of international law nor as other than a simple declaration of policy' – it is exactly this which marks the distinction between the descriptive and the normative approach.

⁴⁷ F.O. Mora and J.W. Cooney, *Paraguay and the United States: Distant Allies. The United States and the Americas* (Athens: University of Georgia Press, 2007).

⁴⁸ Of course, there is the distinction in international law between granted and withheld internal self-government. It has been argued, in this respect, that Kosovo was suffering from such a lack of internal self-government, while this self-government had sufficiently been granted to South-Ossetia and Abkhazia. But the question becomes then: who gets to make these analyses? Such criteria therefore do not solve the problem, but merely transpose it.

adjust to the new status quo and accept that they will have to live with it. We will also see this later on when discussing the dispute over Alsace-Lorraine after the Franco-Prussian war.

The final argument for the view that the difference between the descriptive and the normative approach is not essential is that when invoked by states, the normative approach finds itself in a circular argument: 'We do not recognize this political entity as a state, because it is not being recognized as a state'. The opposite is also true: when the descriptive approach is invoked by states, they already implicitly recognize the existence of a state, and therefore comply with the demands of the normative approach: 'We recognize this state, therefore it has been recognized'. To conclude, recognition by other states is ultimately dependent upon existing power realities. Effectiveness, therefore, always trumps legitimacy (which is also why, in the last instance, classical international law is really a political instrument).

