THE CONTEST ABOUT THE CONCEPT OF SOVEREIGNTY IN MODERN JURISPRUDENCE AND POLITICAL SCIENCE [1])

In the evolution of Jurisprudence and Political Science in the second half of last century many tenets that used to be taken for unassaillable truths, were cast into the melting-pot of criticism. But among these none was of such signal importance as the concept of Sovereignty.

Notably since the two World-Wars the idea that the dogma of Sovereignty ought to be consigned to the lumber-room both scientifically and practically — has made progress in the democratic countries.

Undoubtedly the attack has been specially focussed now on the consequences of the dogma in the department of international law, because international relations have more and more become the centre of interest.

But in the theory of constitutional law and in the general theory of state the opposition against the said dogma had begun to arise already in the second half of the last century.

As early as 1888 the German doctor of constitutional law Hugo Preusz thought that the elimination of the concept of sovereignty from the dogmas of constitutional law would only be a small stap forward on the road this science had taken long since [2]).

Since then sociology of law has asserted itself as a party in the controversy and several of its prominent exponents have pointed out that notably the important metamorphosis of the social-economical structure of Western society has more and more ousted the state from its central position, which formerly seemed to be the basis of the doctrine of sovereign power.

Lastly, one of the well-known mouth-pieces of neo-scholastic Philosophy, Jacques Maritain, has also made his stand against the said

[1]) Rectorial adress, delivered on the occasion of the 70th anniversary of the Free University on 20 October 1950. This oration — considerably enlarged — was published in Dutch by J. H. Paris, Amsterdam: De strijd om het souvereiniteitsbegrip in de moderne Rechts- en Staatsleer (62 blz.).

[2]) *Gemeinde, Staat, Reich als Gebietskörperschaften*, S. 135.

dogma. In a recent article 'The concept of sovereignty' he declared: 'The two concepts of Sovereignty and Absolutism have been forged together on the same anvil. They must be scrapped together'[3]).

That in spite of these combined attacks the concept of Sovereignty had by no means been eliminated from jurisprudence and political science, appeared from the forcible plea Herman Heller made for its complete rehabilitation (1927), a plea that became a fierce arraignment of the tendencies aimed at the undermining of this fundamental concept[4]). And the Viennese professor Alfred Verdrosz, once an adherent of Kelsen's 'Reine Rechtslehre' and as such a fierce opponent of the traditional conception of the authoritative sovereign state, accepted the latter in his book on international law (published in 1937) as the necessary foundation of the law of nations.

On the whole it may be said that in dogmatic jurisprudence the said doctrine still preponderates, even though there is a tendency in this respect to avoid its extreme consequences in international relations.

One should certainly not be justified before the tribunal of science in taking one's stand in this topical contest before realizing the many-sided part that the traditional concept of sovereignty has played in jurisprudence and political science since the 16th century, and the problems that would present themselves if it were eliminated.

In the second place it is an undeniable duty both of science and of politics to inquire whether the currents that are asserted to oppose the said doctrine have indeed disengaged themselves from it or only tend to enforce it again on science and practice in another form. As so often happens in controversies on normative concepts, here too terminological misunderstandings and obscurities may cloud scientific discussion.

Finally to those who in studying science take their stand on the fundamentals of our University it is of predominant importance to realize whether they can accept the way the problem is presented in the modern contest about the traditional concept of sovereignty, or if those who start from the principles of the Reformation must follow essentially different lines of thought.

It does not seem out of place on this 70th anniversary of our University to draw your attention to these fundamental questions, in doing which I shall first of all review the original content and the further

---

[3]) *The American Political Science Review*, vol. XLIV (1950), no 2 p. 343.
[4]) H. Heller, *Die Souveränität* (1927).

evolution of the said doctrine since in the 16th century it made its entry in jurisprudence and political science.

I. THE HISTORY OF THE DOGMA

A. *Bodin's concept of sovereignty and the Humanistic doctrine of natural law*

When five years after the massacre of St. Bartholomew Jean Bodin published his famous work *Six livres de la République*, in which he founded his conception of the State on the concept of sovereignty, he made a hit which became of revolutionary importance both for political science and positive law.

Although he could make use of the Romanized train of thought of early and late-mediaeval legists and though he had a near precursor in the further elaboration of his concept of sovereignty in Aeneas Sylvius, the counsellor of the Emperor Frederick III, none before him had declared sovereignty to be the essential characteristic of every state. The central idea of this concept of sovereignty was not contained in its definition in the Latin edition of Bodin's book: *summa in cives ac subditos legibusque soluta potestas* (supreme power over the citizens and subjects which is not bound by statute law). This formula is often misunderstood on account of insufficient study of Bodin's theory from the original source. Bodin by no means maintained that the sovereign head of the state was above all laws. He considered the sovereign, in explicit contradiction to Macchiavelli, to be subjected to natural and divine law. He considered him, like any of his subjects, to be bound by treaties (contracts), which he, as opposed to mediaeval Germanic conceptions, distinguished definitely from laws as authoritative ordinances.

And though in his time there could not yet be any question of positive international law, as the concept of 'state' had hardly dawned, it was certainly not in accordance with Bodin's doctrine of sovereignty to deny that the state was bound to treaties it had entered into. Only subjection to a *higher worldly power* is according to him incompatable with state-concept. Bodin did not even mean to raise the sovereign head of the state above the so-called 'lois fondamentales' of absolute monarchy. According to him the French king is subjected to these fundamental laws in so far as they

are inherent in the possession of the crown, notably to the Salic law of succession. The adage *Princeps legibus solutus est* (the Prince is above the law) was — as anybody knows — derived from the commentary on the lex Julia et Papia (I, iii, 31) by the Roman legist Ulpianus and was in late-Imperial times explained in terms of absolutism. It was common opinion in the post-glossarist school and the rising humanistic legal school of Alciat, Budé and Zasius and over against the extreme absolutist conception as we find it e. g. defended in the legal school of Toulouse in the reign of Francis I, Zasius started the (qualified) ethical conception, as it was afterwards defended by Bodin and by Calvin. So in this respect Bodin's concept of sovereignty was nothing new.

On the other hand the way in which he elaborated the concept of 'supreme power' was epoch-making. According to him the unity and indivisibility of sovereignty does not allow of any restriction of its mandate, either in power or in task or in time. The Emperor of the Holy Roman Empire, whose sovereign power was much curtailed by the well-known 'Wahlkapitulationen' was therefore — greatly to the vexation of the German legists — denied the title of sovereign and consequently that of supreme head of the state. The French king is not subordinate either to him or to the Pope. Mixed forms of government are inexorably rejected as being incompatible with the concept of sovereignty. But above all, this latter implies — according to Bodin — the *absolute and only original competence for the creation of law within the territory of the state*. The legislative power as the first and most important consequence of sovereignty does not allow of any other original authority for the creation of law. The validity of custom is made absolutely dependent on direct or indirect recognition by statute law, and the same holds good, by implication, for all direct creation of laws in different spheres of life that are contained within the territory of the state. The monopoly in the domain of the creation of law, which the Roman Emperors had not claimed before absolutist Byzantine times, is here, as the natural outcome of sovereignty, proclaimed to be the essential characteristic of any state whatever.

In its general application to the growing absolute state this theory could become a practical programme and dominate the whole concept of positive law for the next few centuries. Science was pressed into the service of politics, which aimed at complete demolition of mediaeval society.

On the collapse of the Carlovingian state society in the Germanic

countries had relapsed into a split-up undifferentiated condition, in which only the hierarchy of the organized church could bring about unity and coordination. Society presented a secular infra-structure and an ecclesiastical supra-structure, which in their mutual relation corresponded to the fundamental religious motif of Roman-Catholicism (the predominating cultural power down to the 14th century): the nature-grace motif.

The secular infra-structure presented a variegated aspect of social corporations, which were cut on two patterns: the guild-pattern and the pattern of the mundium-relation, with many crosses in between.

The guild-pattern was an artificial imitation of the primitive old-Germanic sib, the mundium-relation was a somewhat weakened imitation of old-Germanic absolute domestic power: the mundium.

The first pattern was evolved in the mediaeval cities with their trade-guilds, and in the country in the free villages and 'Markgenossenschaften', the second took effect, more or less markedly, in all mediaeval relations and gradations of domination (Herrschaft): in the higher, medial and lower lordships (seigniories), the feudal relations, the 'Grundherrschaften', etc.

Governmental power could be traded in: it was *res in commercio*, not a public office in the service of a *res publica*. The sovereign lords could freely dispose of it. Once in the hands of private persons or corporations it had become their inviolable right. Hence mediaeval autonomy always implied the exercise of governmental power on one's own authority, which did not even change with the rise of political estates. In this undifferentiated condition of society, in which notably the guilds covered all spheres of human life, a real state-organism could not be evolved.

The idea of the res publica only continued in the theory of the legists versed in Roman law and in Aristotelian-Thomistic philosophy. But it was not founded on contemporary social reality. In this state of affairs it is to be understood that Bodin in his concept of sovereignty claimed the exclusive control of the creation of law for the sovereign head of the state. Mediaeval autonomy in the creation of law was indeed incompatible with the state-concept, for the very reason that it was undifferentiated. In this position of affairs every autonomous law-sphere that claimed an original competence-sphere, at the same time claimed governemental power of its own, which turned against the idea of the res publica, as it did not recognize any limitation by public interest.

But Bodin's doctrine of sovereignty, which was favourable to the policy of bureaucratic centralisation of absolute monarchy, defeated its own object: the monopolization of governmental power. As soon as the process of the differentiation of society is being carried through and the state has monopolized all governmental power, it turns out at the same time that the evolution of law is passing through a process of differentiation as well, which cannot possibly be pressed into the framework of the law-sphere of the State. The doctrine that all positive law finds its legal source in the will of the sovereign law-giver, then proves a political dogma in the full sense of the word, a dogma that is at complete variance both with the general meaning of all law and with the rich structural variety of society.

It is the imperishable merit of the Herborn Calvinistic jurist Johannes Althusius that at a time which was scientifically quite ripe for this absolutist conception of state-law, he expounded a theory of the structure of society, founded on the recognition of a divine world-order and the intrinsic character of the social orbits of life, and in which it was pointed out that each of the latter has its lex propria and its own legal sphere, which cannot be derived from any other. It may be true that this doctrine of the 'symbiosis' lacked the scientific apparatus for a deeper analysis of these social structures; that in its legal construction of every form of human society from some sort of contract it followed the uniform schematic methods of natural law; and that it was not yet quite free from the hierarcho-universalistic views of mediaeval theories. But at any rate it had emancipated it self from the Aristotelian-scholastic theory, which only bestowed the autonomous competency for the creation of law on the so-called societates perfectae: the state and the church, and for that very reason could not resist Bodin's doctrine of sovereignty in the domain of secular law on principle.

Meanwhile the future apparently lay with the latter. Science — legal theory and the theory of state included — was more and more affected by modern Humanistic philosophy with its religious root-principle of *'nature and liberty'*, the dominiation of the realities of nature by science, and the absolute autonomy of man's free personality in the domain of science, morals and religion.

The domination-motif gave rise to the classic-Humanistic ideal of science, which proclaimed the methods of mathematics and natural science — the latter being founded by Galileo and Newton — to be the universal model of thought, on wihćh a new theoretical picture

of reality was designed, which left no room for structural and natural differences, founded on the order of creation.

It had been called to existence by the new motif of liberty, but was — if carried through consistently — bound to collide with the latter. In a construction of reality modelled on the concepts of natural science no room was left for autonomy and liberty of man's personality.

Even in Bodin's political philosophy this scientific ideal — not yet consolidated in his time — began to make its influence felt. Science was pressed into the service of a policy that wanted to build up the state as a rational institution for the purpose of domination, after the demolition of the undifferentiated society of the Middle Ages.

This being the object, Bodin's political theory wanted to evolve the means to this end in a rigorously methodical, mathematical way.

It starts with a definition: 'The state is the lawful government of several households and what they have in common, it having sovereign power'.

And then Bodin declares: 'We premise this definition, because in all things one must trace the principal object first, and only afterwards the means to attain it. Well then, the definition is nothing but the object of the matter under discussion; and if it is not well-founded, everything that is built on it, will collapse soon after'.

But his definition was by no means the result of a conscientious inquiry into the inner nature and structure of the state-organism and of the other social spheres of life. It had been dictated by a political objective that ignored the divine world-order from which Althusius started and only aimed at the complete domination of society by the instrument of the State.

Within the framework that had thus been determined by his political objective, Bodin's concept of sovereignty performed the following various functions, which we ought to remember in their mutual relation in order to be able to judge rightly of their several pros and cons:

1. drawing the boundary lines between the state and all other political and non-political social spheres of life;
2. defining the concept of positive law as the certified will of the law-giver;
3. defining the relation between the different orbits of competence in the creation of law, all of which are to be dependent on the only original competence of the sovereign head of the state by virtue of his legislative power.

The Humanistic doctrine of natural right, founded by Hugo Grotius,

accepted Bodin's concept of sovereignty. It was also pressed into the service of the policy of demolition and renovation. More geometrico, by the analysis of society as it presents itself, into its 'elements', the individuals, and the synthetic construction of the desired new society from these social elements with the help of a juridical social contract, it wanted to build up a new social and legal order. In order to make Bodin's concept of sovereignty acceptable to the humanistic ideas of liberty and autonomy, it constructed the state from a social contract between naturally free and equal individuals, mostly complemented by an authority- and subjection-contract, in Pufendorf even bij a third contract about the form of government. In Hobbes' *Leviathan* an in Rousseau's infallible and all-powerful *volonté général* the concept of sovereignty got its most consistently absolutist elaboration.

With Bodin's concept of sovereignty his conception of the relation between legislation and custom was also accepted. The indigenous customary law had under the test of the classic-Roman tradition of the *ius naturale et gentium* become a *ius iniquum*, a bulwark of feudal society, which was doomed to ruin.

In the new order no other law was allowed than civil law and the *ius publicum*, that is to say the two frameworks of state-law. For that purpose positive law was to be elaborated in exhaustive codes.

It was not until the British philosopher John Locke appeared on the scene, that in the doctrine of natural law a reaction against the absolutist concept of sovereignty arose from the humanistic concept of liberty.

The liberal idea of the constitutional state, evolved by him, led to a rigorous distinction between state and society; and the theory of the division of power, which was presently to get its definite shape in Montesqieu's doctrine of the *trias politica*, was also bound to result in the inner decay of the dogma of sovereignty.

B. *The historical interpretation of the concept of sovereignty and the doctrine of state-sovereignty*

At the time of the Restoration (i. e. after the liquidation of the napoleontic empire) however, the doctrine of sovereignty takes quite a new turn, because now it joins with the principle of legitimacy and the so-called monarchical principle, and denies on principle every contractual construction as propounded by the doctrine of natural law.

Whereas in the preceding period the problem of sovereign power had been tackled from the view-point of natural law, quite detached from the historical past, and only a formulization in accordance with that point of view had been applied to the absolutist or to the more liberal-constitutional tendencies of the time, — now, in accordance with the conservative historical mode of thought of the Restoration movement, full stress is laid on the real or imaginary historical rights of the dynasties that had been dethroned bij the revolution. The pre-revolutionary position of the Bourbons in France served as a model. In the introduction to the charter of Louis XVIII, which preamble was drawn up by Beugnot, the latter gave the standard-formula for the principle of monarchical legitimacy, a formula that passed into the constitutions of several German states and was proclaimed to be unassailable dogmatic starting-point for the deduction of the constitutional status of the princes in art. 57 of the Final Treaty of Vienna.

In this train of thought the sovereignty of the king was not based on the constitution, but inversely the constitution was granted as a charter by the sovereign prince bij virtue of his supposed fullness of power, which was considered to be founded on historical rights. And the required cooperation of the estates or the parliament for the exercise of the legislative power, rested on the voluntary self-restriction of sovereign power.

If on the one hand the concept of sovereignty — for that matter in accordance with Hobbes's and Rousseau's conceptions — was thus tightened up over against Bodin's conception, who considered royal sovereignty legally bound to the *lois fondamentales* of the realm, which were independent of that sovereignty, — on the other hand the historical views of Restoration times struck the first blow to the principles of Bodin's doctrine as regards the monopoly of the sovereign law-giver in the domain of the creation of law. This came about under the influence of an irrationalistic and universalistic turn in the Humanistic liberty-motif as it was elaborated in post-Kantian idealism (notably in Schelling's transcendental idealism).

The absolute value of *individuality* was turned against the over-strained notions of *uniform generality;* and over against the apotheosis of the *individual* in the individualistic mode of thought of the exponents of natural law, the *community* was now enthroned.

Society was no longer considered an aggregate of free and equal individuals, but an organic whole with parts, and the free and autonomous individual personality of man was looked on in the light of

his membership of an equally individual natural community, on which a collective personality was conferred.

This new conception of the Humanistic liberty motif also asserted itself in science. The standard-mode of thought borrowed from physical science was everywhere ousted by a historical way of approach, which aimed at understanding the individual in its individual-historical relations in accordance with the modes of thought in the spiritual branches of science. Over against the rationalistic belief that one could construct political and legal order on an unalterable model which would be in accordance with the doctrine of natural law and ready-made for all times and all peoples, independent of the historical past, all stress was laid now on the organic character of the historical development of a culture that has its true source in the individual national character or 'Volksgeist'. Thus a new ideal of science arose, which, by making the historical aspect of society absolute, led to an exaggerated historical vision (or *'historistic'* vision, if you like) of reality.

And this historical mode of thought was of course bound to turn against the traditional conception of positive law as a product of the sovereign will of the lawgiver.

The Historical school of law, founded by Fr. Carl von Savigny, who proclaimed law to be a phenomenon of historical evolution that originally springs organically — so without being intentionally created — from the individual spirit or conviction of the people, quite broke with the former rationalistic conception as regards the relation between statute law and customary law.

Over against the doctrine of *natural law* was placed that of *folk-law* ('Volksrecht') in its historical evolution, which folk-law did not spring from the will of the sovereign law-giver but from the historical law-mindedness of the people.

Folk-law, which at first reveals itself in the 'Uebung' as customary law, gets, when social relations are becoming more complicated, a technical organ in the class of lawyers, and its technical form in the 'Juristenrecht'. In relation to this, legislation has only a secondary task. If this train of thought were consistently carried through, the traditional concept of sovereignty would have to be discarded as a necessary element in the definition of positive law.

However, it was not the Romanistic, but the Germanistic wing of the Historical school, led by its two principal exponents Georg Beseler and Otto Gierke, which began to draw fatal consequences for the traditional concept of sovereignty from the doctrine of folk-law. If all

law is — as Von Savigny had taught — a historical product of the individual 'Volksgeist' the reception of the Roman law in the Germanic countries must be considered as a denaturation of the healthy development of the Germanic legal institutions. The spirit of Roman civil law — stigmatized as being individualistic — was, just as the absolutist concept of government of the Roman imperium, quite antagonistic to the 'social, corporative' foundations of Germanic law. The study of the old-Germanic popular institutions and of the mediaeval Germanic corporate system led to a more sociological view of jurisprudence and the Germanists proclaimed — in diametrical opposition to the Romanist Puchta — the autonomy of corporations to be a formal original source of law. They discovered internal corporate law as being 'Sozialrecht', which was unknown to classical tradition.

At first this Germanistic rush threatened — under the influence of the historical mode of thought — completely to undermine the foundations of civil law and of the state-concept; but Gierke saw the danger in time and compromised with the idea of natural law. The doctrine of the rights of man (in the classic tradition of the *ius naturale et gentium* the foundation of civil law) must not be sacrificed to the Germanic concept of folk-law, which bound the whole legal status of the individual to the undifferentiated social corporations. The 'Individual-recht' was to be maintained as an independent sphere of law beside the newly discovered 'Sozialrecht' of the corporations, and the classic concept of the state as a sovereign res publica could not be allowed to succumb to the undifferentiated corporative principle of Germanic law.

But Gierke wanted to replace the conception of the bureaucratic sovereign state, derived from the idea of the Roman Empire, which conception was pregnantly expressed in Bodin's identification of the respublica wiht the government, by an 'organic' idea of state, in which the government was to be recognized as an essential organ of an organization of the state that comprised both the government and the people.

This organized state is, according to him, just as any other social corporate sphere, a real 'spiritual organism' with a personality of its own, but it is a 'gegliederte Gemeinschaft', in which both the legal subjectivity of the individual citizens and that of the narrower corporate spheres, integrated into the whole of the state, remain untouched. The Germanic 'Genossenschaftsprinzip' could in this way successfully affect the modern idea of a constitutional state.

Sovereignty in its fullest sense could not belong then to the government or to the people, but only to the state as a whole. The government can only exercise sovereign power as an organ of the essentially corporate state.

Thus the doctrine of the *sovereignty of the state* was born, which in the form propounded by Gierke, was in many respects of a higher conception than those of Gerber, Laband and Jellinek, who are generally considered the typical representatives of this doctrine. And it was notably superior to Bodin's doctrine of sovereignty, which was not based on a really corporate conception of the state.

Meanwhile the new doctrine of the sovereignty of the state, in sofar as it was really in accordance with the train of thought of the Historical School, held all the germs destined to completely undermine the traditional Humanistic concept of sovereignty.

Since the theory of folk-law had led to the doctrine of the autonomous creation of law in the different social spheres, the concept of sovereignty, when elaborated consistently, could no longer have the characteristic quality of being the only original competency for the creation of positive law.

So the question was bound to arise what part it could still play in the definition of the *state*.

Gierke himself still stuck to Bodin's conception that sovereignty was to be considered an essential quality of any state. The latter, in his opinion, is distinguished from all other social spheres of life as a 'sovereign organization of power', which is not to be taken in the sense of 'Genossenschaft', but of 'Gebietskörperschaft', because the first concept applied in his system only to the non-political spheres.

Thus the concept of sovereignty had unmistakably been transferred from the *legal sphere* to the historical-political *sphere of power* and had become a *historical* category instead of one that belonged to the domain of *natural law*.

This conclusion had been emphatically drawn by Gerber, Laband and Jellinek from the rupture with the conception of the doctrine of natural law. And from this it further followed that they — in contradistinction to Gierke — no longer considered sovereignty an essential characteristic of the state, but also acknowledged the existence of non-sovereign states.

As soon, however, as the concept of sovereignty was transferred from the sphere of natural law to the historical sphere of power, a problem presented itself for which the doctrine of sovereignty of the

state could offer no satisfactory solution, namely the question about the relation of the sovereign power of the state to 'law'.

The problem, in this form, had been put in a decidedly uncritical way. For 'state' and 'law' are not in this way to be compared. The sphere of law is — among many others — only a modal *aspect* of human society. The state, on the other hand, is a real corporate sphere of social life, which as such functions in *all* aspects, so necessarily also in its juridical aspect. And the typical structures of the differentiated spheres of social life (state, church, U.N.O., trade, family, etc. etc.) introduce into the juridical aspect that typical variety which makes it impossible to speak of 'law' as such, without further social qualification.

Thus public law and civil law are the two characteristic legal spheres of the state as such, which differ fundamentally from the internal ecclesiastical law, the internal law of trades and industries, etc. and can never be placed *over against* the state.

Gierke, however, went wrong in the putting of the problem, so that it could lead to no sound solution.

According to him 'state' and 'law' are 'zwei selbständige und spezifisch verschiedene Seiten des Gemeinlebens. Jenes manifestirt sich in der machtvollen Durchführung gewollter Gemeinzwecke und kulminirt in der politischen *That*, dieses offenbart sich in der Absteckung von Handlungssphären für die von ihm gebundenen Willen und gipfelt im rechtlichen *Erkennen* ('für Recht erkennen').'[5])

In this untenable juxtaposition of state and law showed the inner conflict between the concept of sovereignty rooted in the Humanistic power- or domination-motif and the folk-law theory of the Historical School, which was based on the Humanistic liberty-motif and was only prepared to acknowledge law as the free and autonomous expression of the 'conviction of the people'.

In other words the problem was born of the Humanistic basic motif of nature and liberty itself and Gierke only tried in a dialectic way to unite the two antagonistic motifs of domination and liberty: for its realizing law, according to him, needs the sovereign state; and the sovereign power of the state, in order not to degenerate into despotism, is in need of law for its foundation.

However, it was not to be denied that the concept of sovereignty clashed with Gierke's doctrine of the social corporate spheres and

---

[5]) *Die Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien* (Tübingen, Mohr, 1915) p. 105.

their autonomous creation of law. Gierke's disciple Hugo Preusz, starting from this doctrine and the folk-law theory of the Historical School, was the first to eliminate on principle the concept of sovereignty. The latter is according to him the necessary correlate of the individualistic concept of personality and both originate from Roman law. The modern constitutional state has — in contradistinction to the absolutist state — developed from the Germanic legal principle of the autonomous 'Genossenschaft'. And the concept of sovereignty does not suit this constitutional state any more. If the state is — as Gierke has expounded — an organic corporate person among quite a series of organic corporate persons, which can be integrated as members into more comprehensive 'persons' of that kind, the problem of the composing parts of the German federal state and of the insertion of that state into the organization of the nations on the basis of international law can also be solved. Everywhere the concept of sovereignty stood in the way of the right insight into this matter.

But this concept of sovereignty is not so easily done away with. From the outset it had played a far more varied part than showed in Preusz' speculations. The Germanistic wing of the Historical School had posited the autonomy of the corporate social spheres as an original formal source of law but had failed to mention a material criterion for the demarcation of the original orbits of competency of the state and the other spheres of life in the domain of the creation of law. Which of them would have to give way in case of conflict?

The doctrine of sovereignty had at least given an unequivocal answer. And Gierke himself did not know how to replace it by another. He too contended that no autonomous corporation law could assert itself against the sovereign will of the state.

The concept of sovereignty cannot be eliminated unless another solution should be offered for the problem concerning the mutual relation of the original orbits of competency in the domain of the creation of law.

And the predominating question in this matter is whether one considers this an intrinsic problem of *law* or an historical question of *power*.

The traditional doctrine of sovereignty had essentially always put it as a question of *power*, for the construction of the sovereign power of the government from a voluntary contract — as the doctrine of natural law had proposed — had likewise been nothing but a juridical mask for the Humanistic power- and domination-motif.

This had created a conflict between 'might and right' that could not be allayed either in Gierke's 'dialectical' way or by Jellinek's well-known doctrine of the voluntary self-restriction of the will of the state by law.

C. *The doctrine of the sovereignty of law (Rechtssouveränität) and its presumed victory over the traditional dogma of sovereignty*

This conflict seemed to be avoided by the doctrine of the *sovereignty of law*, which in three variants, namely the *psychological* one of Krabbe, the *norm-logical* one of Kelsen and the *legal-sociological* one of Duguit and Gurvitch turned against the traditional concept of sovereignty, no matter whether it presented itself in the form of the sovereignty of the government, of the people, or of the state.

In reality, however, the doctrine of the sovereignty of law has not in any way overcome the antinomies of the traditional concept of sovereignty. It wants us to believe that the problems for which the latter seemed to give a solution, would vanish at a blow, if only instead of the state or the people or the government, impersonal legal order were proclaimed sovereign. But legal order is only the law- or norm-facet of the juridical aspect of human society and the great variety in structure which characterizes our modern, much differentiated society, is, as we observed before, also bound to be expressed in its juridical aspect.

So the doctrine of the sovereignty of law cannot escape a definition of the mutual relation of the competency of the state and that of the other social spheres of life. For which of the variants of law could rightfully claim sovereignty? Constitutional law, international law, the internal laws of trades and industries, ecclesiastical law?

Whichever one's choice may be, one will always be obliged to endow one of the social spheres of life with an absolute competency or sovereignty. But an absolute competency can never be a real legal power, as it does not allow of any real demarcation by law.

Thus the doctrine of the sovereignty of law in its turn collides with the general character of all law and is obliged in the end to resolve the problem of juridical competency into an historical question of power.

And yet this doctrine owed its very origin to the attempt to save the independence of law over against power!

Lately Gurvitch (*Sociology of Law*, 1947) tried to escape the difficulty by attributing absolute sovereignty to the unorganized 'superfunctional' community of the nation and the international community of peoples, which he calls the all-embracing infra-structures of society. These would in an absolutely variable way demarcate the orbits of competence of all differentiated 'functional' communities like state, church, industrial organizations, etc.

The super-functional sovereign communities are here thought of as being 'undifferentiated'; in them the idea of 'law' would be embodied 'all-sidely', whereas in the 'functional' communities only special aspects of this law-idea would be expressed.

But there are no unorganized communities with a superfunctional character. The undifferentiated spheres of primitive society are always *organized* and they are doomed to disappear when the process of differentiation sets in in society. Hence Gurvitch is compelled again to proclaim a differentiated corporate sphere to be the exclusive representative and binding interpreter of the absolutely sovereign legal order of the allcomprising 'superfunctional communities'.

Notably in the periods of state-absolutism in which personal liberty and the liberty of the other spheres of life run the greatest danger, that representative, according to Gurvitch, must be the state itself, which now for its usurping interference with the original orbits of competency of the other spheres of life, even receives the sanction of 'sovereign law'!

Thus in this theory of the sovereignty of law too, sovereignty swallows up law, the power-motif predominates over the liberty-motif.

II. THE TRADITIONAL CONCEPT OF SOVEREIGNTY AND THE DOCTRINE OF SOVEREIGNTY-IN-ITS-PROPER-ORBIT

Surveying once more the evolutions of the concept of sovereignty in Humanistic legal and political science, I think I may state the following facts: In all its evolutions, also in that of the doctrine of

the sovereignty of law, it implied the denial of original, materially and juridically defined orbits of competence of the state and the other spheres of life.

Original spheres of competence in this material and juridical sense can never be based on an order of positive law, because any formation of positive law as such presupposes the original competence or jural power to this end. Only derived competency can be based on positive law and consequently have a necessarily variable foundation.

However far up one ascends in any possible hierarchy of derived competencies formed according to the rules of positive law, in the end one will arrive at the *original* competency from which the said hierarchy itself has been derived. What then is the base of this original jural power as the presupposition of all positive law?

This jural power can only be founded on and be materially defined by the inner nature, by the internal structural principle of the social sphere within which it is executed, which principle is independent of any human discretion. As an *original* jural power — not derived from another temporary sphere of life — it may be called *sovereign*, provided this concept of sovereignty is inmediately circumscribed by 'in its proper orbit'. And then at the same time it becomes the radical opposite of the concept of sovereignty construed by Humanistic theories. For in spite of all attempts made by them to provide the latter concept with a juridical basis or at least some legal demarcation, it broke — theoretically — with inner necessity through the boundaries of the original social spheres of competency, and at the same time through the modal confines of the law.

'Sovereignty in its proper orbit' is not some vague political slogan, the cry of a special Christian political party. It is deeply rooted in the whole real order of things, and is not to be ignored with impunity. For it is the expression of the sovereign divine will and wisdom of the Creator, who created all things after their kind and set them their fixed structural boundaries in the order of temporal reality; who maintained this temporal order of reality even after the fall of man, to reveal it in the redemption by Jesus Christ in all its religious fullness of sense: the focusing of all temporal reality on the loving service of the glorification of God.

In other words: sovereignty-in-its-proper-orbit is an universal ontological principle, which only gets its special *legal* expression in the juridical aspect of reality. It reveals two different '*Sachverhalte*' in the structures of reality: 1°. the mutual irreducibility of the latter;

2°. their indissoluble intertwinement and connection in the temporal order of reality.

For only in their indissoluble connection can they reveal their irreducible idiosyncrasy.

This holds good both for the *structures of the different modal aspect of reality* [6]), which fix the general idiosyncrasies of the latter, and the *typical structures* of *individual totality* in which these modal aspects are united in their integral connection and are in characteristically different ways grouped and individualised into an individual whole.

All jural relations — in whatever typical social structure of totality (that of the state, the church, trade, the international relations, etc.) they may present themselves — are as *jural* relations determined by the general modal structure of the juridical aspect of reality.

In this modal structure the whole order and connection of the different aspects are expressed in an irreducible *modus*. It is, as I expounded elaborately in my *Wijsbegeerte der Wetsidee* vol. II, built up from a *nuclear moment*, which warrants the irreducibility of the aspect, and from a series of other structural moments, part of which (the so-called analogies) maintain the inner cohesion of the juridical aspect with all the previously graded and another part (the so-called anticipations) the connection with the later graded ones, but which all of them are qualified by the modal nuclear moment of the juridical aspect.

Among the analogical moments in the modal structure of this aspect the juridical competency or jural power takes an essential place.

It is the necessary condition for all human moulding of the principles of law into concrete form, by which these principles are elaborated into positive norms of law.

Competency is *jural* power, and in this strong term (i. e. 'jural power') the indissoluble connection between the *juridical* and the *historical* aspect of reality is expressed. For *power* or *domination* is the modal nuclear moment of the historical aspect as the aspect of cultural evolution.

---

[6]) In my work *De Wijsbegeerte der Wetsidee* the following modal aspects of empiric reality are distinguished:
The aspect of quantity (number), the space-aspect, the aspect of motion, the energetic (physico-chemical) aspect, the biotic aspect, the psychical aspect of feeling, the logical or analytical aspect, the historical aspect, the symbolic or linguistic aspect, the aspect of social commerce, the economic aspect, the aesthetic aspect, the juridical aspect, the moral aspect and the faith aspect.

Jural power is not a power in an originally historical sense. It is only an historical analogy in the modal structure of law, which is always qualified by the modal nuclear moment of the juridical aspect. But is is *founded* in historical relations of power, and can never be independent of the latter.

This juridical competency is essentially never absolute or exclusive. It premises a number of original orbits of competency that are in jural relations of mutual circumscription and balance. For like in all fundamental concepts of jurisprudence there is to be found in the concept of competency also a *numerical* analogy, in which the inner cohesion between the juridical and the quantitative aspect is expressed. Jural life in which only one jural subject would function is no more possible than any true jural life in which only one original orbit of competency for the formation of law would be given. Even in a still undifferentiated society this is impossible.

From this it appears again that the traditional concept of sovereignty must necessarily collide with the modal sovereignty-in-its-proper-orbit of the juridical aspect of social reality.

As in the theoretical conception of reality from which this notion of sovereignty started, there was even no room for the modal structures of the different aspects of social reality, it could a fortiori have no place for the typical structures of the different social spheres, because the latter cannot be understood without being based on the former. So the concept of sovereignty was proclaimed the essential characteristic of the state, because the internal structural principle of the latter (and with it its inner *nature*) had been eliminated.

Well, it is exactly these structures of the social spheres of life that lend to each of the original spheres of competency their *typical* material content and circumference.

In the order of reality they are founded as structural *principles*, but they can only be realized by being *moulded into concrete form* by man.

Te result of this fashioning human activity are the *social forms*, which have always an historical foundation and vary throughout with the historical evolution of society.

The typical structural *principles* of the social spheres of life, on the other hand, have a permanent and invariable character, because they determine the *inner nature* of these spheres. Not the *inner nature* of the state or the church-institute changes in the course of times, but only the *social forms* in which these social institutes are realized. These

social forms are the nodal points of the mutual intertwinement of the orbits of life, which are so entirely different in their internal structure and nature.

But as each of the modal structures of the aspects in their mutual connection retains its modal sovereignty-in-proper-orbit, so each of the typical structures of the differentiated social spheres in their mutual intertwinement maintains its typical sovereignty-in-its-proper-orbit and with it in the juridical aspect its original sphere of competency in the domain of the creation of law.

The state has no exceptional position in this respect. It has only sovereignty-in-its-proper-orbit. However, this does not away with the fact that its original jural power is of quite a different kind.

Conformable to its internal structure the state must be characterized as a territorial and institutional corporation of public law, a public juridical community of government and subjects on the historical basis of a monopolistic organization of the power of the sword. For like any differentiated social structure, that of the state is also *typified* by two modal functions acting in different modal aspects, the first of which is called the typical 'qualifying' or 'directive function', the second the 'typical basic function'.

This internal structural principle is also expressed in the other aspects of the life of the state: the moral, the economic, the symbolic, the sensory, the biotic aspect, etc.

The directive function of the state — in contradistinction to all other spheres of life — has its place in the *juridical* aspect of social reality. This means that the state acting *as such* in the domain of the creation of law, has no original competency for the creation of law subservient to some non-juridical destination.

All law that is, conformable to the internal social structure within which it obtains, typically subservient to such a metajuridical destination, such as, e. g. the economically qualified internal law of trades, or the internal ecclesiastical law, qualified as it is by its faith-destination, is specific law: *ius specificum*.

The law framed by the state, on the other hand, is by its very nature *ius commune*.

In accordance with its general modal structure law shows a correlation of what we call partner- and communal relations, because in any social relation, whatever its typical structure may be, this correlation is inherent.

In the partner-relation the subjects do not act as member of a

whole, but are coordinated, *beside* or even *over against* each other. In the communal relation, on the other hand, they are united as members of a whole that comprises all of them.

In typical state-law we therefore meet with the correlation of two typical spheres, namely *civil law* and *public law*, the first of which being a state-law regulating the civil partnerrelations of men as such, the latter being an inner social law of the state as a public community.

These are the two original spheres of competency of the state in the domain of the creation of law, which are materially demarcated by their inner structure and idiosyncrasy.

In accordance with their typical constitution *internal* law of trades or *internal* ecclesiastical law cannot assume the character of public law or civil law.

Non-state law, it is true, will as *ius specificum* be subjected to a typical *binding* in civil and public law, and therefore it would seem as if the state had absolute sovereignty as to the creation of law. These false appearances are strengthened when the internal structural principles of the social spheres and their typical legal spheres are not seen and the juridical forms in which positive law is laid down, such as acts, ordinances, contracts, statutes, jurisdiction, etc. are exclusively paid attention to.

For just as social forms proved to be the nodal points of the mutual intertwinement of social orbits, so in the juridical aspect the formal sources of law are the nodal points of the mutual intertwinement of the original orbits of competency. But even in the closest mutual intertwinements each of the latter maintains its sovereignty in its proper orbit.

This is neither the time nor the place to elaborate all this further here. Allow me, therefore, to conclude my reflections on the concept of sovereignty with a final word.

In the course of my argument the fundamental objections I have set forth against this concept in its traditional interpretation, have got a deeper background in the total theoretical conception of reality from which it was born.

The theoretical conception of reality from which the different branches of science start, is never neutral towards religion but is intrinsically dominated by the religious basic-motif through which scientific thought-activity gets its central driving-force.

Here lies the inner and necessary point of contact between religion and science.

According as our University expands, the inner reformation of our theoretical vision of reality becomes more and more urgent.

For it is not steeds and horsemen that will lead us to victory in the effort to realize the ideal of its founder, but only and finally the inner motive-power of the Scriptural basic-motif of the Reformation: that of the creation, the Fall of man and our Redemption by Jesus Christ, which must also radically change our theoretical vision of reality, if we want to aim at a science that is not merely *scholastically accomodated,* but really *re-formed* in an intrinsic Christian sense.

H. DOOYEWEERD