

# Provisions for a European Constitution

## I. Underlying constitutional concepts

The Provisions for a European Constitution lay down the goal of establishing a European Union in a sovereign European (Federal) State:

1. It explains the underlying constitutional concepts, particularly that of a (democratic) sovereign state.
2. It applies this concept to today's European Union, on the one hand, and to the European (Federal) State as envisaged above, on the other hand.
3. It outlines the constitutional process necessary for the achievement of a European (Federal) State.

## II. The concept of (democratic) sovereign statehood

The established definition of a *State* is a social entity that possesses the following qualifications: a permanent population, a defined territory and a government.<sup>1</sup> In international law, such an entity is considered a state where the global community recognises it.<sup>2</sup>

A state is sovereign if it is not subject to a higher power. Such a higher power may be another (external) State or power that controls the (then non-sovereign) State. In multilevel political structures, a higher power might lie with a different entity than the respective State. Thus, a State is sovereign if it has supreme authority over a specific territory.<sup>3</sup> (State) Sovereignty can thus be defined as the claim of **self-determination**.<sup>4</sup>

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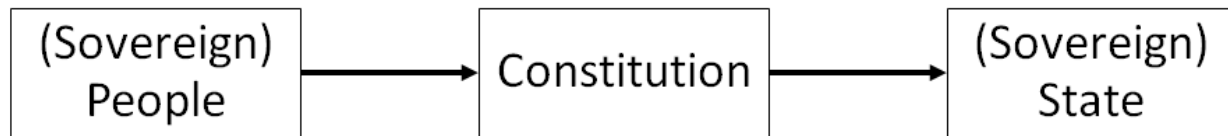
<sup>1</sup> Three Elements Theory by Georg Jellinek (1851-1911), see Jellinek, *General Theory of State* (1900).

<sup>2</sup> Article 1 of the Montevideo Convention on Rights and Duties of States adds the qualification of "capacity to enter into relations with other states" to the previous three.

<sup>3</sup> Philpott/Zalta, *The Stanford Encyclopedia of Philosophy*, Fall 2020 ([Link](#)).

<sup>4</sup> The concept of self-determination is the core concept in the theory of sovereign statehood as defined by the German Federal Constitutional Court (FCC), see e.g. FCC, judgment of 30 June 2009 - *Lisbon*, para. 228 ([Link](#)).

State sovereignty is derived from a Sovereign. In (historical) monarchies, sovereignty lay with the crown. In modern democracies, sovereignty lies with the people.<sup>5</sup> People can establish a sovereign State by way of a willful act, the instrument of which is the Constitution:



The claim of self-determination manifests itself in certain prerequisites which are constitutive of a sovereign (self-determined) state:

- *Competency self-determination:* In multilevel political systems, the division of competencies is key to exercising power. Competencies are naturally divided over several levels. However, there is a maximum of one level deciding the division of competencies. The power to decide over the division of competencies is labelled as *Kompetenz-Kompetenz*. The political level which has the *Kompetenz-Kompetenz* determines whom (i.e. which political level) it wants to exercise which political powers. It can exercise political powers on its level or delegate them to another (higher or lower) level. By ruling on the division of competencies, it is competently self-determined.
- *Financial self-determination:* Politics cannot be conducted without financial means. Thus, for a political entity to act in a self-determined way, it must have an exclusive say over its revenues and expenditures (budgetary sovereignty)<sup>6</sup>; in other words, external political power cannot determine its revenues and expenditures.
- *Physical self-determination:* Political self-determination requires the physical freedom to do so. If a political entity is subject to force by another power (e.g. in the context of an occupation or a serious threat), it is subjected to the will of that other power and thus no longer acts freely and in a self-determined way. The ability to ensure non-interference of foreign powers is thus constitutive to political self-determination.<sup>7</sup>

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<sup>5</sup> The concept of sovereignty has very limited factual elements. It is largely a theoretical construct to justify the claim of an entity to supreme authority (e.g. in distinguishing itself from other State actors).

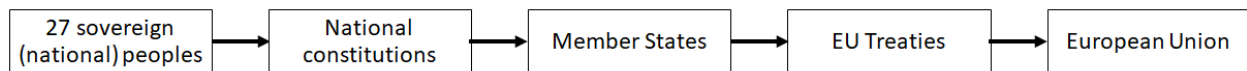
<sup>6</sup> See FCC, judgment of 18 March 2014 - *ESM*, para. 161 ([Link](#)).

<sup>7</sup> The list is not considered exhaustive. The listed prerequisites are considered, however, crucial for understanding the concept of sovereign statehood for the purpose of this Supporting Document.

### III. The constitutional nature of today's European Union and of the envisaged European (Federal) State

Based on the above, today's European Union is not a sovereign State. It can be argued that the EU has a permanent people, a defined territory and a government (understood as public authority). In application of the Montevideo Convention, one can even argue that the EU can enter into relations with other States as it has been empowered to do so by its Member States. Thus, the EU has State-quality.

The EU is not sovereign, however, because it does not base itself on a sovereign (people). The EU much rather derived its power - indirectly - from 27 separate sovereign peoples - the ones of its Member States. Thus, the coming into being of the EU can be visualized as follows:



The EU Treaties<sup>8</sup> fulfil the constitutional function of setting up a political entity (the European Union) and they contain classical elements of a Constitution (e.g. institutional provisions, fundamental rights). They do not, however, constitute a Constitution in that they are derived from a sovereign and establish a sovereign State. In this regard, the Member States act as intermediaries in that they retain all State sovereignty but pass on some of their political powers to the European Union. The EU Treaties are international treaties (albeit with far-reaching content).

The EU lacks the above-mentioned prerequisites of a self-determined/sovereign State.

- It does not have the *Kompetenz-Kompetenz*. Rather, Article 5(2) TEU provides for the principle of conferral according to which “the [EU] shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”. The principle of conferral complements the principle of *Kompetenz-Kompetenz*. Where one part has the *Kompetenz-Kompetenz*, the other part is subject to the principle of conferral. In today's European Union, the *Kompetenz-Kompetenz* rests with the Member States. Against the will of a single Member State, the EU is not conferred any power. It is thus not *competentially sovereign*.

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<sup>8</sup> TEU, TFEU plus annexes, protocols, declarations and the Charter of Fundamental Rights of the European Union, in short, EU primary law.

- The EU does not self-determine its financial means. Instead, it depends on financial contributions from the Member States. The financial means are defined in the Multiannual Financial Framework, which requires unanimity from the Member States.<sup>9</sup> The same holds true for the Own Resources Decision.<sup>10</sup> The EU is thus not financially sovereign but depends on the financial will of the Member States.
- Lastly, the EU cannot ensure its own defence without the Member States. It does not have its own armed forces and the establishment of a common defence requires a unanimous decision of the Member States.<sup>11</sup> Thus, the EU also lacks military sovereignty which remains with the Member States.

In addition, the EU cannot substantially amend its own constituting document (the EU Treaties) without the will of the Member States<sup>12</sup> and cannot ensure its own existence.<sup>13</sup>

The European (Federal) State envisaged by this Policy shall have the constitutional quality of a sovereign (federal) State. Within the Federation which it constitutes, the European level shall have the supreme authority and shall not depend on the political will of its constituent States.

For these purposes, the European (Federal) State shall be based on its own Constitution which provides it with full sovereign statehood including *Kompetenz-Kompetenz* and budgetary and military sovereignty.

## IV. The constitutional process to a European (Federal) State

The creation of a democratic sovereign European (Federal) State requires a unified European sovereign, one European people. That European people can be the democratic foundation of a sovereign European Federal Republic in the following way:



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<sup>9</sup> See Article 312(2) TFEU.

<sup>10</sup> See Article 311 TFEU.

<sup>11</sup> See Article 42(2) TEU.

<sup>12</sup> See Article 48 TEU.

<sup>13</sup> See Article 50 TEU which allows for one-sided withdrawal from the EU, something which is not possible in a sovereign State unless the supreme authority consents (see e.g. Scotland, Catalonia); there is no general right to secession from a sovereign State, neither under constitutional nor under international law.

The creation of a (sovereign) European people requires the integration of today's separate peoples of the Member States into one. This integration requires a wilful act of each of these peoples to join a (to-be-created) European people, e.g. respective referenda. With the execution of this act, democratic sovereignty is shifted from the peoples of the Member States to the (one) European People.<sup>14</sup>

Once the European People is established, it can, by way of another wilful act, give itself a European Constitution by which it establishes a sovereign European (federal) State.

Insofar as this European Constitution foresees the integration of the previously sovereign Member States into the newly created European (federal) State, they now become (non sovereign) federated States of that European (federal) State.

The separation of both acts, the integration of national peoples into one European people and the passing of a European Constitution, would be the cleanest way to conduct the necessary constitutional process. This is because the first act, the integration of national peoples into one European people, is a decision to be taken by each national people separately (because up to that moment they remain sovereign and independent). The decision to pass a European Constitution, however, is a decision of the (newly integrated) European people.

However, it is conceivable that both acts are conducted at the same time. For this purpose, national referenda could be held on a pre-drafted European Constitution which each national people votes to accept or reject. The acceptance of the European Constitution necessarily implies the integration of the peoples accepting the European Constitution into the European people and the loss of their (independent) sovereignty.

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<sup>14</sup> Even though it was created for a different purpose, Article 146 of the German Basic Law explicitly provides for the possibility of the German people to give themselves a new Constitution. This includes the possibility of giving up sovereignty and of integrating into a larger people with other peoples. (Article 146 of the Basic Law articulates the concept of democratic sovereignty which underlies the Basic Law. However, even without the existence of Article 146, that right of the German people would still exist as it is pre-constitutional.)