

Neutralizing the Sovereignty Question

Compromise Strategies in Constitutional Argumentation before European Integration and since

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Social function of sovereignty – Taming sovereignty through compromise strategies – The sharing strategy – The creation of a new unreal bearer of sovereignty – Leaving sovereignty itself untouched but forbidding the use of it – Abolishing the concept – Redefining the concept – Challenges to the Westphalian paradigm of international legal sovereignty – National answers to the challenges of European integration – A new compromise formula – Neutralizing the sovereignty question.

INTRODUCTION

This article aims to show first how the internal aspect of the originally radical concept of sovereignty was tamed in different constitutional orders by conceptual compromise strategies.¹ New challenges to the external aspect (i.e., international legal sovereignty) call however for new compromises. The article then examines whether the compromise strategies applied originally for the internal aspect can be used analogically for the problems of the external aspect posed by European integration, or whether there are other conceptual ways to go.

In order to understand the social function of sovereignty, we have to have a look at the context that gave birth to it. The concept originated in the 16-17th centuries in Western Europe. The bloody anarchies caused by religious wars, emerging capitalism's need for predictability of rules and legal certainty, and the con-

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flicts about absolutistic tendencies of monarchs called for a new doctrine ensuring a clear-cut, determinate solution to intrastate power relations. Because of secularisation it could no longer be a theological doctrine. Also due to secularisation, the former divine legitimisation of monarchy was no longer current. So one had to face a new question: 'Why should one follow the law made by the monarch?' And the new answer was: 'because he is sovereign'. By this, we have exchanged God and divine natural law for the secularised doctrine of sovereignty.² In addition, because of the need for a clear-cut solution, (monarchical) sovereignty – as described by Jean Bodin, the father of the concept, in his *Six livres de la République* (1576), later explicitly by Thomas Hobbes in his *Leviathan* (1651) and implicitly by Samuel von Pufendorf in his *De jure naturae et gentium* (1672) – was conceived to be 'all or nothing', i.e., either unlimited or non-existent. According to this doctrine, in a given territorial entity there is only one single final and unlimited decision-centre that cannot be questioned, neither from inside (internal aspect) nor from outside (external aspect).

In the next centuries, the discussion on the concept of sovereignty focused on how to tame this unleashed concept, which was necessary to maintain peace and order in the time of the religious wars, but had become one of the major threats to peace and freedom in the new political context. This was because, if there was such an absolutistic competence, then you had to possess it; otherwise your enemy would use it against you. Bodin, Hobbes and Pufendorf had invented the big gun, and in the next centuries a series of philosophers, politicians and lawyers worked on the problem of where to hide it, so that no one got hurt.

TAMING THE INTERNAL ASPECT OF SOVEREIGNTY: COMPROMISE STRATEGIES IN NATIONAL CONSTITUTIONAL LAW

The question of who possesses this unlimited sovereignty has led to or threatened to lead to bloody conflicts and civil wars in different European countries. In England, the major scene of this long-lasting conflict was the Civil War of 1642–48.³ The solution was found finally in the compromise formula 'King-in-Parliament' (currently: 'Queen-in-Parliament') by the Glorious Revolution (1688–89).⁴ As Blackstone formulated it,

² On the theological origins of legal concepts, see Carl Schmitt, *Political Theology* (Cambridge, Mass., 1985) p. 36.

³ Hans G. Petersmann, *Die Souveränität des Britischen Parlaments in den Europäischen Gemeinschaften* (Baden-Baden, 1972) p. 233–239.

⁴ The expression 'Parliamentary Sovereignty' is imprecise; as the highest law-making power does not lie with the Parliament but with 'King-in-Parliament' (by his royal assent), see Theo Langheid, *Souveränität und Verfassungsstaat. The Sovereignty of Parliament* (Köln, 1984) p. 328–329 – even if the monarch did not refuse the royal assent to a bill in the last three centuries, see Christopher

In all States there is an absolute Supreme Power, to which the Right of Legislation belongs; and which, by the singular Constitution of these Kingdoms, is vested in the King, Lords, and Commons.⁵

Sovereignty (in the English perception: the highest law-making power) was given to the old enemies (King and Parliament) together, to their common custody.⁶ We can call it the *sharing* strategy. ‘King-in-Parliament’ can make, amend and repeal any laws without restriction, as there is no constitution in the continental European sense. So sovereignty is still perceived as indivisible, unlimited,⁷ but no longer as belonging to a single individual.

In France, the theory of Bodin on monarchical sovereignty received a new challenge: popular sovereignty (*souveraineté populaire*) as represented by Rousseau.⁸ The unanswered question (besides other factors) whether the monarch or the people are sovereign, contributed to the outbreak of the French Revolution (1789). The structure of Rousseau’s sovereignty theory was actually at some points very similar to that of Bodin, except that for Rousseau, sovereignty is the exercise of the general will (*volonté générale*) and not of the will of the monarch. It is still indivisible; it has simply a new bearer: the people.

The conflict was solved – as opposed to England – not by conferring sovereignty on monarch and people, but by creating an abstract spiritual subject that can safeguard this dangerous weapon: the nation.⁹ The idea of national sovereignty (*souveraineté nationale*) was born in 1789 in the French Revolution.¹⁰ The invention of this very abstract concept was an attempt to reach a compromise

Hollis, *Parliament and its Sovereignty* (London e.a., 1973) p. 171. If we define Parliament as tripartite (monarch, House of Commons and House of Lords together), then the expression ‘Parliamentary Sovereignty’ can be accepted, see H.T. Dickinson & Michael Lynch, ‘Introduction’, in H.T. Dickinson & Michael Lynch (eds.), *The Challenge to Westminster. Sovereignty, Devolution and Independence* (East Linton, 2000) p. 1.

⁵ William Blackstone, *An analysis of the laws of England*, 6th edn. (Oxford, 1771) p. 3. We should not confuse this legal problem (‘legal sovereignty’) with the question, which organ’s will or body prevails normally in political practice (‘political sovereignty’) lying in England with the House of Commons or eventually rather with the electorate), see Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn. (London & New York, 1959) p. 73-74.

⁶ The law-making by ‘King-in-Parliament’ is consistent both with the idea that law-making authority belongs to the monarch who chooses to exercise this right only with the consent of his subjects, and with the idea that authority belongs to the whole community, see Jeffrey Goldsworthy, ‘The Development of Parliamentary Sovereignty’, in H.T. Dickinson & Michael Lynch (eds.), *The Challenge to Westminster. Sovereignty, Devolution and Independence* (East Linton, 2000) p. 12 and 14.

⁷ Cf. the failure of Sir Edward Coke to declare void a statute in the *Doctor Bonham’s* case (1610), Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Oxford, 1999) p. 111-112 and 122-123.

⁸ Jean-Jacques Rousseau, *Du Contrat Social* (Amsterdam, 1762).

⁹ Cf. Michel Troper, *La théorie du droit, le droit, l’Etat* (Paris, 2001) p. 302: ‘La nation est distincte du peuple réel; c’est une entité abstraite’.

¹⁰ Sieyès, *Qu’est-ce que le Tiers Etat?* (s. l., 1789).

between popular sovereignty and the sovereignty of the monarch, in order (1) to avoid general suffrage (which follows from popular sovereignty) and (2) to avoid monarchical absolutism as well, but (3) at the same time to prevent the partition of the state territory by emphasising its indivisibility.¹¹ The father of the concept, Sieyès, took part in the drafting both of the Declaration of the Rights of Man and the Citizen (1789) and of the Constitution of the constitutional monarchy (1791), and his idea was received in both cases.¹² As the nation is not simply the aggregation of citizens, but is rather a spiritual entity, this concept necessarily implies representative solutions as opposed to the directly democratic popular sovereignty. We will call this solution the *mystifying* strategy.

Today's French constitutional doctrine, though, was reached only after a further compromise: a compromise between the compromise formula of national sovereignty on the one hand, and popular sovereignty on the other hand.¹³ Pure popular sovereignty was compromised by the extensive abuse of referenda under Napoleon I and Napoleon III; pure national sovereignty was perceived as insufficient from a legitimacy point of view.¹⁴ This 'compromise of compromise' can be found in Article 3 of the Constitution of the Fifth Republic in the following form: 'National sovereignty belongs to the people ...'¹⁵ It unifies the representative national sovereignty and the directly democratic, republican popular sovereignty. This path permitted acceptance both of the indivisibility of territory, the inalienability of sovereignty, and the representation by Parliament or the Head of State, on the one hand (national sovereignty), and on the other hand universal suffrage, referenda, and the republican form (popular sovereignty).

The question still remained, whether this sovereignty had some kind of limits. The taming of sovereignty by accepting its limited nature was achieved by a decision of the Constitutional Council in 1985 on New Caledonia: 'The law once voted ... is the expression of the general will, but only with due respect for the

¹¹ On the origins of the concept of national sovereignty, see Guillaume Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale* (Paris, 1985).

¹² Art. 3 of the Declaration of Human and Citizen's Rights: 'The principle of all sovereignty lies essentially in the Nation. No body, no individual may exercise any authority that does not expressly emanate from it.' Title III Articles 1 and 2 of France's first written Constitution of 3 Sept. 1791: '(1) Sovereignty is one, and cannot be divided, alienated or extinguished. It belongs to the Nation, and no section of the people, nor any individual, may claim to exercise it. (2) The Nation, from which all powers stem, may only exercise them by delegation.'

¹³ Jacques Ziller, 'Sovereignty in France: Getting Rid of the *Mal de Bodin*', in Neil Walker (ed.), *Sovereignty in Transition* (Oxford, 2003) p. 261-277.

¹⁴ Florence Chaltiel, *La souveraineté de l'Etat et l'Union européenne, l'exemple français* (Paris, 1999) p. 64-65. The French expression '*souveraineté de l'Etat*' corresponds to the external aspect, as opposed to the internal aspect, the '*souveraineté dans l'Etat*', see Jean Gicquel, *Droit constitutionnel et institutions politiques*, 15th edn. (Paris, 1997) p. 53.

¹⁵ The very same formula was enacted already in Art. 3 of the 1946 Constitution (Fourth Republic).

constitution.¹⁶ One of the central ideas of continental European constitutionalism is that the sovereign beast is put in chains in the form of a constitution. Sovereignty can be used only in a specific (constitutional) manner.¹⁷ We can call it the *chaining* strategy. Unlimited sovereignty has become limited: we have redefined it.

Germany of the 19th century went a different way. Sovereignty was not conferred on a spiritual entity like the French 'nation', but rather on an abstract institution possessing legal personality: on the state (*Staatssoveränität*).¹⁸ Since Hegel, this concept was used to neutralize the conflict between monarchical sovereignty and popular sovereignty.¹⁹ Both the monarch and the people became mere organs of the state.²⁰ Let us call this the *institutionalising* strategy.²¹ The concept of sovereignty was neutralized: no one was able to operationalize this *ultima ratio* in intrastate conflicts, i.e., to use it in concrete cases.²² The big gun was hidden for some decades ... until the Weimar Constitution conferred it on the people.²³ The reaction to this was given by the (in)famous constitutional theorist Carl Schmitt. He stated, 'sovereign is he who decides on the state of emergency', i.e., the

¹⁶ Decision 85-197 DC 23 August 1985, see Ziller, *supra* n. 13, p. 268.

¹⁷ There remained, however, some rare exceptions: the Constitutional Council denied any review of amendments of the Constitution (either by the Parliament or by a referendum), see decision 2003-469 DC of 26 March 2003, and the review of any legislation approved in a referendum, see decision 92-313 DC of 23 Sept. 1992 (*Maastricht III*). Or, to put it simply: a 'loi votée' has to respect the Constitution only if it is not a constitutional amendment (by Parliament or by referendum) and if it is voted merely by Parliament (i.e., without a referendum).

¹⁸ Michael Stolleis, *Public Law in Germany 1800-1914* (Oxford, 2001) p. 343-347.

¹⁹ Hermann Heller, *Die Souveränität* (Berlin, 1927) p. 59.

²⁰ Helmut Quaritsch, *Staat und Souveränität* (Frankfurt aM, 1970) p. 471-505.

²¹ This conceptual solution has led also to the current situation in German scholarship in which sovereignty as such is not really a topic, but rather 'statehood' serves as the central concept, see, e.g., Peter Badura, *Staatsrecht*, 3rd edn. (München, 2003) p. 1-5; Theodor Maunz & Reinhold Zippelius, *Deutsches Staatsrecht*, 30th edn. (München, 1998) p. 1-3; Hartmut Maurer, *Staatsrecht I* (München, 2003) p. 1-6.

²² Instead of the French 'general will' the German doctrine used the 'state will' as being behind the law-making process (*Staatswillenspositivismus*). The question of why the state has legitimacy for law-making was answered in a very specific way, namely, by the 'doctrine of state goals' (*Staatszwecklehre*), i.e., a doctrine explaining why and what a state as such has the imminent right to do in order to achieve specific aspects of the common good. By the emergence of popular sovereignty, the *Staatszwecklehre* had become outdated and useless (see Christoph Möllers, *Staat als Argument* (München, 2000) p. 192-198), but the state-centred conceptual framework (also in the traditional German genre of *Allgemeine Staatslehre* or 'general theory of the state' such as Karl Doehring, *Allgemeine Staatslehre*, 3rd edn. (Heidelberg, 2004)) is still very influential in Germany's constitutional doctrine, see esp. Josef Isensee, 'Staat und Verfassung', in Josef Isensee & Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. II., 3rd edn. (Heidelberg, 2004) p. 3-106. Most constitutional law textbooks still have the title 'state law' (*Staatsrecht*), see, e.g., Ekkehart Stein & Götz Frank, *Staatsrecht*, 19th edn. (Tübingen, 2004); Ulrich Battis & Christoph Gusy, *Einführung in das Staatsrecht*, 4th edn. (Heidelberg, 1999); Dieter Schmalz, *Staatsrecht*, 3rd edn. (Baden-Baden, 1996).

²³ Art. 1(2): 'State authority derives from the people'.

Reichspräsident (according to Article 48 of the then valid Constitution of the Weimar Republic).²⁴ Sovereignty was again claimed to belong to one single person. In addition, it was possessed by one single person until the Allies ended the war in 1945. The new German Basic Law in 1949 (re)enacted the popular sovereignty clause of the Weimar Constitution (*Grundgesetz* Article 20 II: 'All power stems from the people.') – with a strong limit however. A referendum was (and is) not allowed.²⁵ The meaning of popular sovereignty became in that way just an abstract (emptied) formula about the legitimacy of Parliament(s). Sovereignty was given back to the people, but it became *verboten* for them to use it directly. It was hidden (by the *Bundesverfassungsgericht*) in a well-guarded bank vault; so the owner could not jeopardize others and him- or herself by using it.²⁶ Only elected (chosen) agents, i.e., the Parliament, have been allowed to use it, and only under surveillance of the *Bundesverfassungsgericht*. We can call this the (*monitored*) *agent* strategy.

However, some even feared that the owner would one day ask for that well-guarded property from the bank and no one would be able to impede him. So the best way was to expropriate him or her, so we could secure the values of the constitution forever. But who should own the treasure? The answer followed from the goal of the expropriation: if we want to defend the constitution, then we should confer sovereignty on the constitution itself. Therefore, the most abstract, emptiest and most counterintuitive formula was born: the sovereignty of the constitution.²⁷ The constitution is no longer the chain binding down the sovereign; it has become the sovereign itself. Sovereignty was superseded by its own chains. We can call this the *substituting* strategy.

Instead of using the German style of overcomplicating formulas, the Austrian constitutional doctrine simply dispensed with the concept. This was possible, as the constitution did not mention the term at all (as opposed, for example to the French Constitution). This approach can be traced back to Hans Kelsen, the famous Austrian constitutional and international lawyer who, as one of the drafters

²⁴ Schmitt, *supra* n. 2, p. 5. For an account on past and present German constitutional topoi of state of emergency and their context, see András Jakab, 'German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse', *German Law Journal* (2006) p. 453-477.

²⁵ The only exception is a referendum on new boundaries between two *Länder* according to Art. 29 of the *Grundgesetz*.

²⁶ Sovereignty seems to be similar to the One Ring of the Lord of the Rings that is too dangerous for anybody to use, and mystifies and corrupts everybody bearing it. No moral stance is stronger than that, no will can resist it; it leads even the best to terrible actions. If you bear it, you do not possess it, but it possesses you. You love it, you call it 'My Precious', and you cannot live without it. It becomes even more important than your life.

²⁷ Peter Häberle, *Verfassung als öffentlicher Prozeß* (Berlin, 1978) p. 368, 395. Similar views from the past by Hugo Krabbe, *Lehre der Rechtsouveränität* (Groningen, 1906) p. 97, and the German Hugo Preuß, *Gemeinde, Staat und Reich* (Berlin, 1889) p. 135.

of the Federal Constitution (B-VG) of 1920, still has enormous influence. Kelsen in his *Reine Rechtslehre* (*Pure Theory of Law*, 1934) tried to evolve a legal theory without sociological, political, and moral arguments (i.e., a pure theory) and to fight the traditional doctrine of sovereignty. In earlier writings, he decidedly criticised the traditional concept of sovereignty, which he felt was based on a jumbled mixture of legal and sociological arguments, i.e., a normative inference from facts (with the typical argument that from effective power stems a right to command).²⁸ Kelsen argued that, if the two types of argumentation were kept distinct, two possible categorisations of sovereignty would remain. First, one could define sovereignty as factual (sociological) sovereignty – though one must then confront the reality that complete independence does not factually exist.²⁹ In the alternative, if one were to define sovereignty as a legal term, two further definitions emerge. Either it is understood as a catalogue of state competences – which however become arbitrary and unjustifiable³⁰ – or it is simply a characteristic of the legal order. Kelsen advocated the latter. He conceived of sovereignty as a feature of the legal order, namely, as ‘non-derivability’.³¹ This means that ‘sovereignty’, according to him, is a characteristic of a normative system. Thus, accepting both monism and the primacy of international law, which are other tenets of Kelsen’s theory, the state (in his perception the legal order) is not sovereign because it is derived from international law.³² Only international law is sovereign. As a result of these complicated considerations, the term ‘sovereignty’ is banned from constitutional considerations.³³ The related problems are solved without this concept, e.g., instead of ‘popular sovereignty’ one speaks of ‘democracy’; instead of ‘independence’ one speaks of the ‘international legal situation of Austria’, and instead of ‘defending sovereignty’ rather of ‘maintaining the basic principles

²⁸ For a critique of the concept of fact-based sovereignty of the Hungarian legal theorist, Felix Somló, *Juristische Grundlehre* (Leipzig, 1917) p. 93, 97-98, 102, see Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (Tübingen, 1920) p. 31. Somló’s doctrine was inspired by Austin’s theory of sovereignty in *The Province of Jurisprudence Determined* (London, 1832) see Somló, *ibidem*, p. 32-37, 200-204, 248-291, and 353-359.

²⁹ Kelsen, *supra* n. 28, p. 7.

³⁰ Hans Kelsen, ‘Der Wandel des Souveränitätsbegriffes’, in *Studi filosofico-giuridici dedicati a Giorgio del Vecchio* (Modena, 1931) Vol. II, p. 8-9.

³¹ Kelsen, *supra* n. 28, p. 10.

³² *Id.*, 13; Hans Kelsen, *Allgemeine Staatslehre* (Berlin, 1925) p. 103; Hans Kelsen, ‘Les rapports de système entre le droit interne et le droit international public’, *Recueil des Cours* (1926) p. 251, 256.

³³ Later, though, Kelsen develops an understanding of sovereignty as directness in international law (Hans Kelsen, ‘The Principle of Sovereign Equality of States as a Basis for International Organization’, *Yale Law Journal* (1944) p. 208), meaning that a legal order is sovereign when its validity follows directly from international law. In this sense, the state can properly be called sovereign – as opposed to non-sovereign (sub-)states within a federal state. However, at that time, Kelsen was already in the US, and these thoughts were no longer received in Austrian constitutional scholarship.

of the Federal Constitution'. Austria did not go the way of complicated compromise formulas, but rather excluded the concept as such from argumentation. The big gun was not hidden; it was destroyed. We can call this the *disarmament* strategy.³⁴

In Hungary, for a long time, sovereignty did not occur as a problem of constitutional law. Hungarian constitutional scholarship was inoculated against sovereignty by the vaccine named the 'doctrine of the Holy Crown', which was first described at the beginning of the 16th century.³⁵ It was an amalgam of medieval organic state theories and crown theories.³⁶ According to this, the estates and the king were 'partakers' of the Crown, and the king himself did not have power but only the Holy Crown (i.e., the object exhibited today in the Hungarian Parliament in Budapest), with which he was crowned.³⁷ The territory of the kingdom was owned by the Holy Crown; the king had only a mandate to exercise power for the Crown. In that form, the concept was already a compromise between estates and monarch. This mystical theory also allowed democratising in the sense that not only the estates but also all citizens eventually became 'partakers of the Holy Crown'.³⁸ This compromise strategy is actually similar to the French mystifying strategy of *souveraineté nationale*: conflicts are conceptually prevented by merging the rivals in a mystical entity.

With the end of second World War the kingdom fell, and with the newly established popular republic the sovereignty of the 'working people' appeared in Hungary. In the decades of socialism there was no need for a constitutional compromise, as dictatorships dislike admitting compromises (even if they sometimes make them), and the constitution was just a facade anyway. The transformation to the rule of law has filled the doctrine of popular sovereignty with content: referendums became possible.³⁹ However, this competence seemed to jeopardize

³⁴ For Kelsen, the grounds of the 'disarmament' were not political, but rather epistemological, see András Jakab, 'Kelsens Völkerrechtslehre zwischen Erkenntnistheorie und Politik', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) p. 1052-1053. This is, however, irrelevant from our point of view, because we are interested here in the practical political role of the concept. To put it in other words, Kelsen destroyed the (Austrian) big gun on technical and not on political grounds. The political consequences are the same, i.e., the neutralizing of the concept has been done.

³⁵ Stephanus Werbőczy, *Opus Tripartitum juris consuetudinarii inclyti regni Hungariae* (Vienna, 1517).

³⁶ András Gergely & Gábor Máthé (eds.), *The Hungarian State. Thousand Years in Europe* (Budapest, 2000) p. 24-28.

³⁷ The crown was holy because it was the crown of *Holy* Stephan (1000-38), the first king of Hungary, who had Christianised the Hungarians. So the crown also objectified the idea of divine legitimacy that survived (despite of secularisation in civil and political life) until the end of WWII. The secular doctrine of sovereignty was not commensurable with it.

³⁸ See, e.g., Stephan Csekey, *Die Verfassung Ungarns* (Budapest, 1944) p. 208-218.

³⁹ A referendum on details of transformation in 1989 played an important role in the set-up of the new democratic system. Later on, other referenda decided on both NATO and EU accessions of Hungary.

the constitutional system, when a referendum on a constitutional amendment was initiated in 1999 by an extra-parliamentary group. When the judges of the Constitutional Court, in spite of the lack of any explicit basis for this approach in the constitution, pulled the brake and unanimously declared unconstitutional any binding referendum on a constitutional amendment on the ground that a referendum is only a subsidiary form of exercise of power beyond the parliamentary principle, they probably thought that the people might vote irresponsibly on the grounds of temporary passions and emotions, without weighing consequences.⁴⁰ As Géza Kilényi points out, by this decision the referendum became 'mere silver jewellery on the gown of the nation'.⁴¹ Hungary has placed the big gun into a glass case, which can be shown proudly, but rather not be used. In fact, Hungary has ended up quite near to the German agent solution.

If we want to systematise the neutralizing strategies, then we can differentiate between five different types. The simplest one is the sharing between different bodies (King and Parliament in England). The most used is the creation of a new unreal bearer of sovereignty (to which the claimants might belong), like state (Germany No. 1), nation (France), Crown (Hungary No 1.), or constitution (Germany No. 3). The third type is leaving the sovereignty itself untouched but forbidding the making use of it (Germany No. 2 and Hungary No. 2). The most radical solution is to abolish the concept (Austria). Finally, the typical lawyerly method of redefining the concept was used by the chaining strategy in the form of a constitution (here shown by the example of France).

These five abstract types cover, in my view, all the general strategies conceptually possible – even if the concrete national cases are not the only possible examples of them.

TAMING THE EXTERNAL ASPECT: CHALLENGES TO INTERNATIONAL LEGAL SOVEREIGNTY

The idea of absolute sovereignty sketched in the introduction (i.e., in a given territorial entity there is only one final decision centre) became generally accepted in international relations by the Peace of Westphalia (1648).⁴² Its main principle

⁴⁰ Decision of the Hungarian Constitutional Court, 25/1999. (VII. 7.) AB hat.

⁴¹ Géza Kilényi, 'A képviselői és a közvetlen demokrácia viszonya a magyar államszervezetben' (The Relationship Between Representative and Direct Democracy Within the Hungarian State Structure), *Magyar Közigazgatás* (Hungarian Administration) (1999) p. 681.

⁴² Christopher Harding & C.L. Lim, 'The significance of Westphalia: an archaeology of the international legal order', in Christopher Harding (ed.), *Renegotiating Westphalia* (The Hague e.a., 1999) p. 1-23. Or at least later this date was chosen as the milestone, even if at that time the doctrine was still counterfactual, see Stéphane Beaulac, *The Power of Language in the Making of International Law* (Leiden e.a., 2004) p. 71-101.

was non-intervention, applicable also to the Pope, which meant a secularisation in international relations. At that time it seemed to be the best way to secure peace and stability in international relations – i.e., for the same reasons put forth by Bodin, Hobbes and Pufendorf.

This Westphalian paradigm can be characterised as follows.⁴³ The world consists of, and is divided by, sovereign states which recognise no superior authority;⁴⁴ the process of law making, the settlement of disputes and law enforcement are largely in the hands of individual states.⁴⁵ All states are internationally regarded as equal before the law; legal rules do not take account of asymmetries of power.⁴⁶ International law is orientated to the establishment of minimal rules of co-existence; the creation of enduring relationships among states is an aim, but only to the extent that it allows national political objectives to be met. Responsibility for wrongful cross-border acts is a ‘private matter’ concerning only those affected; differences among states are ultimately settled by force; the principle of effective power holds sway.⁴⁷ Virtually no legal fetters exist to curb the resort to force; international legal standards afford minimal protection. The minimisation of impediments to state freedom is the ‘collective’ priority.

The right definition or test for international legal sovereignty in order to find out whether a territorial entity is sovereign has always been contested. One attempt is to list the sovereign rights (competences) such as: 1. the right to have international relations and make treaties, 2. the right to have its own currency, 3. the right to have an army and police, 4. non-intervention by other states, and

⁴³ On the basis of Michael Keating, ‘Sovereignty and Plurinational Democracy’, in Neil Walker (ed.), *Sovereignty in Transition* (Oxford, 2003) p. 194 and David Held, *Democracy and Global Order* (Stanford, Calif., 1995) p. 78.

⁴⁴ Emmerich de Vattel, *Le droit des gens* (Londres, 1758), (Washington, 1916) p. 7 states a nation is sovereign ‘qui se gouverne elle-même sous quelque forme que ce soit sans dépendance d’aucune étranger’ (that governs itself in whatever form but independently from anything foreign).

⁴⁵ The self-subjection theory of Georg Jellinek, that says a state has international legal obligations only by subjecting itself to these, was founded on these presuppositions, Georg Jellinek, *Die rechtliche Natur der Staatenverträge* (Wien, 1880). Alf Ross shows how paradoxical this theory was: ‘One either has to take seriously that the state is only limited by its own will; but in that case there will be no real limits, no real international law. Or one will have completely to embrace the restrictions of international law. However, in that case the state will be bound by things beyond its own free will, and will in that case not be “absolutely sovereign”, see Alf Ross, *International Law. An Introduction* (København, 1984), p. 44 (in Danish), cited by Marlene Wind, *Sovereignty and European Integration. Towards a Post-Hobbesian Order* (Basingstoke e.a., 2001) p. 9. Also the obvious problem why new states are obliged by old international customary law (and by *jus cogens*) was never solved.

⁴⁶ Emmerich de Vattel, *Le droit des gens* (Londres, 1758), (Washington, 1916) p. 7: ‘A dwarf is as much a man as a giant; a small Republic is no less a sovereign state than the most powerful kingdom.’ The formulation is perceived as a sign of individualist philosophy at the inter-state level by Wilhelm G. Grewe, *The Epochs of International Law* (Berlin & New York, 1984) p. 415.

⁴⁷ Until the Briand-Kellogg Pact (1928), which later also became customary international law, abolished the *ius ad bellum* in international law.

5. the competence-competence within a state (and its special original form, the *pouvoir constituant*).⁴⁸ The question of how to find out which rights are sovereign rights, and which are not, was never answered. Therefore, the list might be non-comprehensive. Unfortunately from the perspective of our interest in defining the notion, sovereignty as such is not defined in any international treaty either (probably, because an agreement on it would be impossible); the concept of sovereign equality is simply presupposed by Article 2(1) of the United Nations Charter: 'The Organization is based on the principle of the sovereign equality of all its Members.' Again, unfortunately, the concept of 'sovereign equality' is not as obvious as the drafters of the United Nations Charter would have us believe. 'Equality' probably means equality in two basic rights: exclusion of any other state, i.e., protection of a state's autonomy and independence (impermeability of territory, *par in parem non habet iurisdictionem* [immunity]), on the one hand, the state's equal membership in the international community, i.e., in the United Nations (with the important infringement on equality in the Security Council), on the other hand.⁴⁹ But what could 'sovereignty' mean? By having a look at the *travaux préparatoires*, it becomes clear that 'sovereignty' was meant simply to exclude the legal superiority of any one state over another;⁵⁰ i.e., sovereignty simply means equality in the enjoyment of the two 'sovereign' rights mentioned above.⁵¹

However, the full acceptance of the first sovereign right, i.e., the exclusivity, is not satisfactory in the light of new challenges, especially of globalisation.⁵² Its environmental,⁵³ economic⁵⁴ and criminal aspects make clear that we are facing a new kind of state interdependence with cross-border dangers. So it is becoming slowly recognized that for the same reasons for which Bodin and Hobbes invented their concept, i.e., for security and stability, the traditional sovereignty concept should be derogated. More co-operation is needed between states, or even subordination. We are facing – to use an expression by Stephan Hobe – a time of open statehood (*offene Staatlichkeit*).⁵⁵

⁴⁸ For a similar 'listing approach' in contemporaneous literature see Antonio Cassese, *International Law* (Oxford e.a., 2001) p. 89-90.

⁴⁹ Bardo Fassbender, 'Sovereignty and Constitutionalism in International Law', in Neil Walker (ed.), *Sovereignty in Transition* (Oxford, 2003) p. 132.

⁵⁰ *Ibid.*, p. 128.

⁵¹ The dominant view is that sovereign equality is not *jus cogens*, so every state can deviate from it by international treaty, see *ibid.*, p. 137.

⁵² Charles W. Kegley & Gregory A. Raymond, *Exorcising the Ghost of Westphalia – Building World Order in the New Millennium* (Upper Saddle River, NJ, 2002) p. 154-175; Maryann K. Cusimano (ed.), *Beyond Sovereignty. Issues for a Global Agenda* (Boston e.a., 2000).

⁵³ For a detailed analysis, see Cornelis Theunis van der Lugt, *State Sovereignty or Ecological Sovereignty?* (Baden-Baden, 2000).

⁵⁴ David A. Smith, Dorothy J. Solinger & Steven C. Topik (eds.), *States and Sovereignty in the Global Economy* (London e.a., 1999).

⁵⁵ Stephan Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz* (Berlin, 1998) p. 380-443.

Another new phenomenon challenging the Westphalian paradigm is that after the demise of the Soviet-Union, the Western World can force its morals (human rights, democracy) on the rest of the world.⁵⁶ It is leading to the derogation of essential parts of sovereignty, such as immunity (Pinochet case) and non-intervention (Yugoslavia). It can be feared that this new approach may lead to wars similar to the religious wars of the 16-17th centuries.⁵⁷

A third new challenge to traditional international legal sovereignty, forming a central part of this paper, is European integration. With regard to European Union member states it is no longer plausible to talk about the traditional sovereignty concept, as European Community law obviously strongly intervenes in internal state relations of member states, and as Community law perceives itself as original (not delegated) authority. This was clearly stated by the European Court of Justice in *Costa v. ENEL*:

*the law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question (emphasis added).*⁵⁸

European Community law is directly applicable and prevails over the national legal order, including constitutions (supremacy). This approach presupposes the European Union's sovereignty,⁵⁹ even if the Court of Justice drew the consequence rather moderately in *Van Gend en Loos*, stating 'the Community constitutes a new legal order' for the benefit of which member states 'have limited their sovereign rights'.⁶⁰ In fact, by accepting supremacy and direct effect, a new sovereign was born.

⁵⁶ Cf. Paul Williams, 'Fighting For Freetown: British Military Intervention in Sierra Leone', in Colin McInnes & Nicholas J. Wheeler (eds.), *Dimensions of Western Military Intervention* (London e.a., 2002) p. 140-168; Robert H. Jackson, 'International Community beyond the Cold War', in Gene M. Lyons & Michael Mastanduno (eds.), *Beyond Westphalia?* (Baltimore, Md., e.a. 1995) p. 59-83; Mariano Aguirre & José Antonio Sanahuja, 'Haiti: Demokratie durch Einmischung?', in Tobias Debie & Franz Nuscheler (eds.), *Der neue Interventionismus* (Bonn, 1996) p. 155-184. An overview of the theoretical problems is given by Luis E. Lugo (ed.), *Sovereignty at the Crossroads? Morality and International Politics in the Post-Cold War Era* (Lanham, 1996).

⁵⁷ Cf. Jeremy A. Rabkin, *The Case for Sovereignty* (Washington, 2004) p. 110-111, 121.

⁵⁸ ECJ 15 June 1964, Case 6/64, *Costa v. ENEL* (1964) ECR 585 para 3. Cf. Hans Peter Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen, 1972) p. 58-62 on the *Gesamtakt* (common act) of the member states creating a new legal order, not just pooling their competences.

⁵⁹ Gráinne de Búrca, 'Sovereignty and the Supremacy Doctrine of the European Court of Justice', in Neil Walker (ed.), *Sovereignty in Transition* (Oxford, 2003) p. 449-460.

⁶⁰ ECJ 5 Feb. 1963, Case 26/62, *Van Gend en Loos v. Administratie der Belastingen* (1963) ECR 1 para 3.

Therefore, we have a serious and explicit legal challenge regarding the sovereignty of Union member states. The European Union does intervene seriously in internal matters of these states, and the statement of non-intervention by outer decision centres is not plausible regarding these countries. These states obviously have not only one final decision centre, but two. It is worthwhile to have a look at the member state (constitutional and doctrinal) answers as to how they face this new challenge.

MEMBER STATE ANSWERS TO (AND IGNORANCE OF) THE CONSTITUTIONAL CHALLENGE OF UNION MEMBERSHIP

The main British solution for dealing with the legal problems of European Union membership was section 2(4) European Communities Act 1972: 'any enactment passed or to be passed ... shall be construed and have effect subject to the foregoing provisions of this section'. The supremacy of Community law was based on it.⁶¹ As Community law empowers both the courts and the executive, the only loser of the new situation is Parliament. Therefore, the question is how to deal with it in the light of the traditional British doctrine of parliamentary sovereignty (or more precisely: the sovereignty of 'King and Parliament').⁶² There are two main traditional approaches for this. The first one (the orthodox approach) argues, that supremacy of Community law is based on the will of Parliament, and Parliament retains the right to repeal or amend an Act in a manner inconsistent with Treaty obligations.⁶³ The second one (the common law approach) argues that the authority of the courts is not derived from Parliament, but is original. The fact that the courts apply Community law instead of British law in case of conflicts is not as revolutionary as it seems to be at first sight, because 'King in Parliament' was never omniscient. Sedley has referred to it as a:

bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable – politically to Parliament, legally to the courts.⁶⁴

Or, in the words of Paul Craig: 'there is no a priori inexorable reason why Parliament, merely because of its very existence, must be regarded as legally omniscient'.

⁶¹ Paul Craig & Grainne de Búrca, *EU Law*, 3rd edn. (Oxford e.a., 2003) p. 301-312.

⁶² Kenneth A. Armstrong, 'United Kingdom – Divided on Sovereignty', in Neil Walker (ed.), *Sovereignty in Transition* (Oxford, 2003) p. 327-350.

⁶³ Continuing Dicey's and Austin's tradition today Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Oxford, 1999) p. 15. Embedding it into a rather Schmittian conceptual framework, Martin Loughlin, *The Idea of Public Law* (Oxford e.a., 2004) p. 33-37, 87, 95.

⁶⁴ Sir Stephen Sedley, 'Human Rights: a Twenty First Century Agenda', *Public Law* (1995) p. 386.

petent.⁶⁵ This common law approach is rather a legacy of the time before modern statehood, but it has something in common with the orthodox view: it is based on the idea of British sovereignty – the two approaches simply confer sovereignty onto (partly) different bodies.

Similarly, the dominant view in French constitutional doctrine sees French sovereignty as still existing despite European Union membership.⁶⁶ The three Maastricht decisions of the Constitutional Council did not deal directly with member state sovereignty as endangered by European integration, but presupposed in the argumentations that it still exists.⁶⁷ In its *Maastricht II* Decision, the Constitutional Council argued that

constitution-making power is sovereign; it may repeal, modify or complement clauses that have constitutional value in the form it deems appropriate; and thus nothing opposes the introduction of new clauses in the Constitution which derogate from a constitutional rule or principle in the circumstances it refers to; such a derogation may be explicit as well implicit.⁶⁸

So the French constitution-making power was able to allow membership in the European Union by an explicit clause. In *Maastricht III* 92-313 DC of 23 September 1992, the Council had been asked by members of Parliament if the Act that was approved by referendum and allowed for the ratification of the Maastricht Treaty was compatible with the Constitution. The Council found that it lacked any jurisdiction to review any act approved by referendum, because such acts ‘constitute the direct expression of national sovereignty’ as they ‘have been adopted by the French People by referendum’.⁶⁹ So, in conclusion, the French answer is that (French) national sovereignty still belongs to the (French) people.⁷⁰ The French

⁶⁵ Paul Craig, ‘Britain in the EU’, in J. Jowell & D. Oliver (eds.), *The Changing Constitution*, 4th edn. (Oxford, 2000) p. 79.

⁶⁶ Cf. Olivier Beaud, *La puissance de l’Etat* (Paris, 1994) p. 457-491; Ziller, *supra* n. 13, p. 261-277.

⁶⁷ In *Maastricht I*, decision 92-308 DC of 9 April 1992, the Council had been asked by the President of the Republic whether the Maastricht Treaty could be ratified without prior amendment of the Constitution (cf. Art. 3 on sovereignty). The answer was no, so Art. 88 was amended for Maastricht (‘transfer of necessary competences’). See Florence Chaltiel, *La souveraineté de l’Etat et l’Union européenne, l’exemple français* (Paris, 1999) p. 164-166 and 176-179.

⁶⁸ In *Maastricht II*, decision 92-312 DC of 2 Sept. 1992, the Council was asked by members of Parliament if the Maastricht Treaty was compatible with the Constitution as it had been revised in the meantime. This time the Council declared the Treaty in conformity with the Constitution.

⁶⁹ Paradoxically, due to the wording of Art. 3 of the Constitution, the Council had to quote this power of referendum as the direct expression of *national* sovereignty, whereas it is *de facto* clearly a triumph for *popular* sovereignty. See Ziller, *supra* n. 13, p. 273.

⁷⁰ Thus, also the supremacy of EC law over French constitutional law can be based only on the French Constitution itself, see Jan Herman Reestman, ‘Conseil Constitutionnel on the Status of (Secondary) Community Law in the French Internal Order. Decision of 10 June 2004, 2004-496 DC’, 1 *EuConst* (2005) p. 316-317.

people can use this sovereignty towards any goal, even for an accession to the European Union. At the most, we can talk about a temporary self-limitation of national sovereignty with the remaining possibility of revoking it.

In Germany, Article 23 I Grundgesetz allows conferral of 'sovereign powers' on the European Union, under the precondition of safeguarding the principles of German constitutional law (democratic, social, and federal principles and the rule of law), as well as subsidiarity.⁷¹ The German Federal Constitutional Court, the *Bundesverfassungsgericht*, in a series of decisions (Solange I, Solange II, Maastricht, Banana Market) emphasized that 1. member states are 'still masters of the Treaties' (*Herren der Verträge*) and 2. the German Federal Constitutional Court has the right to review European Union measures (particularly on their compatibility with the fundamental rights of the Grundgesetz), although 3. it will not exercise this right because generally the protection of fundamental rights in the Union is on a high level. These arguments were also based on the continued existence of national sovereignty (or within the German conceptual framework: statehood) in the European Union.

In Austria, as we have already seen above, the concept of sovereignty is not used. The argumentation has, however, a similar structure. The dominant opinion states that, though European Union law has supremacy over Austrian law, even over 'simple' constitutional law, the core constitution, i.e., the 'basic principles' of the Federal Constitution (that can be modified according to Article 44(3) B-VG only by a referendum), cannot be derogated from (unless a referendum approves it).⁷²

In Hungary, the integration clause of the constitution speaks only about jointly exercising and not about conferring competences.⁷³ The strange formula seeks to ensure the defence of national sovereignty.⁷⁴ This has, however, only a rhetorical importance, as in practice the same will happen as when competences had been conferred. Just as in other Eastern European member states, it is often emphasized

⁷¹ 'To realize a unified Europe, Germany participates in the development of the European Union, which is bound to democratic, social, and federal principles and the rule of law as well as the principle of subsidiarity and provides a protection of human rights essentially equivalent to that of this Constitution [*Grundgesetz*]. The Federation can, for this purpose and with consent of the Senate [*Bundesrat*], delegate sovereign powers. ...'

⁷² Theo Öhlinger, *Verfassungsrecht* 3rd edn. (Wien, 1997) p. 89.

⁷³ Art. 2/A.(1): 'By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as "European Union"); these powers may be exercised independently and by way of the institutions of the European Union.'

⁷⁴ László Kecskés, 'Indítói tézisek a Magyar Köztársaság Alkotmánya EU-vonatkozású szabályainak továbbfejlesztéséhez' (Starting Points for a Future Amendment of the Provisions of the Hungarian Constitution on EU Matters), *Európai Jog* (European Law) (2004) p. 6.

that sovereignty itself is not affected by accession to the Union, but only competences.⁷⁵ As Anneli Albi points out, this 'sovereigntist' thinking also appears in the texts of constitutions, which are often characterised by a traditional ethno-cultural approach, by a series of provisions about sovereignty and independence and their safeguards, by the ethnically defined nation-state and by national self-determination.⁷⁶ Constitutions often differentiate between independence and sovereignty: partial delegation of sovereignty is sometimes accepted (internal aspect, competences), but never a derogation of independence (statehood or external sovereignty).⁷⁷ These constitutions and their scholarship mostly do not speak the language of post-sovereignty but rather a pre-Soviet language of old-style, ethno-cultural sovereignty.⁷⁸ This can be explained by the fact that autonomous control or even statehood has just been (re)established, so the sensitivity of the question is much stronger.⁷⁹ In conclusion, these countries adhere even more strongly and obviously to the rhetoric of national sovereignty than those in Western Europe.

FINDING A NEW COMPROMISE FORMULA BETWEEN NATIONAL SOVEREIGNTY AND EUROPEAN INTEGRATION

The situation shortly described is that dominant views in the member states' constitutional doctrines ignore the actual challenge of the European Union to national sovereignty and by some kind of self-deception believe that (almost) nothing has changed. Why is this so? It is because the question of sovereignty is not a neutral, scientific one. It is a highly politicised concept, a politically highly sensitive area.⁸⁰ No one wants to see sovereignty given up to another entity (without feeling primarily a member of the latter), because it is linked to identity. 'We are

⁷⁵ E.g., in the Polish literature Cezary Mik, 'Sovereignty and European Integration in Poland', in Neil Walker (ed.), *Sovereignty in Transition* (Oxford, 2003) p. 398, as sovereignty is not mentioned in the text of the empowerment clause of Art. 90 Polish Constitution. It is worth mentioning that this Article is generally about conferring competences on international organizations. A special Europe-clause does not exist in Poland.

⁷⁶ Anneli Albi, 'Postmodern versus Retrospective Sovereignty: Two Different Discourses in the EU and the Candidate Countries', in Neil Walker (ed.), *Sovereignty in Transition* (Oxford, 2003) p. 401-421 with further references.

⁷⁷ Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (Cambridge, 2005) p. 122-130.

⁷⁸ *Ibid.*, p. 130-138. For a critique of the sovereigntist case-law of the Hungarian Constitutional Court, see András Sajó, 'Learning Co-Operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy', *Zeitschrift für Staats- und Europarechtswissenschaften* (2004) p. 354-371.

⁷⁹ Cf. Albi, *supra* n. 77, p. 18-36.

⁸⁰ Hans Lindahl, 'Sovereignty and Representation in the European Union', in Neil Walker (ed.), *Sovereignty in Transition* (Oxford, 2003) p. 87.

sovereign', and simply the state is sovereign, in which we are living. There is a series of traditional criticisms of it, both for descriptive reasons⁸¹ and for normative (moral) reasons,⁸² and some new ones based on the new internal state structure of multi-centred 'polyarchy',⁸³ but they all remain ineffective and unconvincing for all those who were touched by the identity spirit of sovereignty. These people would never give up 'Their Precious', neither for epistemological, nor for moral reasons.

However, European integration calls at least for a compromise, as it has happened several times in the history of sovereignty. As a typical lawyerly task, we are called upon to elaborate conceptual solutions that ensure that national sovereignty does not endanger European integration (so it cannot be operationalised any more), but which does not frustrate the member states by expropriating them of their sovereignty. We need an argumentation strategy that satisfies both of these requirements.

So the time has come to look back at whether the compromises applied in national constitutional law as shown above can be used here analogically. The five general strategies sketched above covering, in my view, all the strategies conceptually possible are (just to recall them) as follows: the sharing strategy, the creation of a new unreal bearer of sovereignty, leaving sovereignty itself untouched but forbidding the use of it, abolishing the concept, and finally redefining the concept.

The sharing (British) way would be to give sovereignty to those rivals who claim it. In our case it would be a doctrine similar to the United States doctrine of shared (or divided) sovereignty.⁸⁴ At the end of the 18th century, when the Ameri-

⁸¹ Cf. Neil Walker, 'Late Sovereignty in the European Union', in Neil Walker (ed.), *Sovereignty in Transition* (Oxford, 2003) p. 6-8 on descriptive fallacy (redundancy and incoherence), and the criticism of Kelsen (see above at Austria).

⁸² Jacques Maritain, *Man and the State* (Chicago, 1951) p. 51-53 argues that sovereignty means *absolutism*, and *accountability* contradicts sovereignty, so we have to give up the concept on moral grounds. For a similar moral conclusion, see Bertrand de Jouvenel, *Souveraineté. À la recherche du bien politique* (Paris, 1955) p. 235, 251-252, 266-268, 360-371, who thinks sovereignty means power that is *above the rules*. For an attack in the name of individualism, see Harold J. Laski, *Studies in the Problem of Sovereignty* (New Haven, 1917) p. 5, 273.

⁸³ Horst Dreier, 'Souveränität', in *Görres-Staatslexikon*, Vol. 4., 7th edn. (Freiburg e.a., 1988), p. 1207-1208 talks (on the trail of Harold Laski, Ernst Forsthoff and Werner Weber) about loss of internal state competences because of polyarchy, party statehood (i.e., when the actual state power lies with different political parties) and the rule of corporations, which is similar to the feudalism (i.e. the time before sovereignty and before modern statehood).

⁸⁴ With references to James Madison and Alexis de Tocqueville, see Jeffrey Goldsworthy, 'The Debate About Sovereignty in the United States', in Neil Walker (ed.), *Sovereignty in Transition* (Oxford, 2003) p. 440-441. For a similar solution in the EU, see Utz Schliesky, *Souveränität und Legitimität von Herrschaftsgewalt. Die Weiterentwicklung von Begriffen der Staatslehre und des Staatsrechts im europäischen Mehrebenensystem* (Tübingen, 2004) p. 541-542 and 545-546 who proposes the concept 'common sovereignty' (*gemeinsame Souveränität*) of EU and member states (instead of 'shared sovereignty') in order to preserve the indivisible character of sovereignty.

can Union was founded, the United States were conceived as something ‘*sui generis*’, just like the European Union today.⁸⁵ Shared sovereignty would mean for us that sovereignty is divided between Brussels and the member states.⁸⁶ This doctrine has, however, a dark history. As David Livingstone points out,

The debate over the European Union today resembles the debate of 1787-89 between the Federalists and Anti-federalists, the latter of which feared that the Constitution would end in a consolidated nationalism, and the former who assured them that such could never happen. One hopes that this will not degenerate into something like the shouting match between southerners who claimed that the Constitution was not a consolidated regime and northern unionists who declared that it was and always had been. However, it could. One already hears from the left the claim that the European Union is an instrument for achieving human rights and that the powers surrendered to the Union cannot be recalled. This was exactly Lincoln’s doctrine. Unless the right of secession is thought through and faced squarely, one can imagine Europe re-enacting the melancholy history of the United States.⁸⁷

The mere doctrine of divided sovereignty without an explicit answer to the question of secession is not a stable compromise formula.⁸⁸ We can argue that it is already possible according to the general rules of public international law – so this problem does not seem to be unsolvable. Nevertheless, the major problem is rather that member state constitutional rhetoric does not want to admit that its ‘Precious’ is divided with anyone, so we should rather search for another solution.

After the sharing strategy, let us have a look at the strategies creating a new bearer. The French way would be to invent an imaginary concept like the European nation or spirit bearing the sovereignty together with the people. The problem is to decide whether the people are the European people or the peoples of the member states. The former (i.e. to base sovereignty partly on a European people) would not be consistent with the national popular sovereignties, and thus would be unacceptable from a member state point of view. The latter would result in a

⁸⁵ Goldsworthy, *supra* n. 84, p. 424.

⁸⁶ For a similar view in French literature (i.e., member state sovereignty has transformed, and some kind of European sovereignty has emerged), see Florence Chaltiel, *La souveraineté de l’Etat et l’Union européenne, l’exemple français* (Paris, 1999) p. 380-385 and Ziller, *supra* n. 13, p. 277. According to Chaltiel, this European sovereignty is however not autonomous, but rather a ‘*souveraineté collective*’ of the member states and a polyarchy (defined as a political system characterised by a plurality of decision centres) in the sense of Robert Dahl, *see ibid.*, p. 467-469.

⁸⁷ David Livingstone, ‘The Secession Tradition in America’ in David Gordon (ed.), *Secession, State and Liberty* (New Brunswick, 1998) p. 22-23.

⁸⁸ On the fact that sovereignty matters were not thought through thoroughly by the Founding Fathers, see Jack N. Rakove, ‘American Federalism: Was There an Original Understanding?’, in Mark R. Killenbeck (ed.), *The Tenth Amendment and State Sovereignty* (Lunham MD, 2002) p. 107-129.

solution similar to divided sovereignty. The 'European nation or spirit' would mean practically Brussels; the peoples of member states would mean the national level. As we have noted above, it is not a viable way.

The first German solution would be some kind of complicated abstract institution bearing sovereignty. Again, we can use United States constitutional history to clarify the analogy. One of the conceptual solutions for that sovereignty problem was that sovereignty is vested in three-fourths of the States governments as forming one aggregate body (constitution-amending power).⁸⁹ In the European Union this would mean sovereignty is vested in the whole of the member states' legislatures as forming one aggregate body (treaty-amending power). The member states still have their sovereignty as members of that aggregate body; they simply exercise it together with the other member states.⁹⁰ As opposed to the idea of shared sovereignty (quasi-British solution, *see* above), the Union itself would not gain sovereignty in this conception. This doctrine is one possible solution from a member state point of view (sometimes referred to as 'pooled sovereignty'),⁹¹ but not the only one. It is, however, doubtful whether this is in conformity with the self-perception of Community law as a supreme and autonomous legal order in the Union territory. This is namely a compromise rather amongst the member state sovereignties and not between member state sovereignty and European integration. Thus it would not be acceptable from an integrationist point of view.

The third German option would be to confer sovereignty on the Founding Treaties. However, this is not only counterintuitive, but also requires the member states to give up their sovereignty. Therefore, this option stands no chance of success either.

The historical Hungarian solution would be to construe a community (though without the mystical idea of objectifying it in a Crown) 'partaker' of which is everybody who claims original power. That would mean a jumbled community of 'European people', (British) 'King and Parliament', (French) 'nation and people', (Hungarian and German) 'peoples of member states', etc., bearing the sovereignty. Nevertheless, as opposed to the idea of shared sovereignty, the partakers do not possess on their own any part of sovereignty; only the community as a whole bears the sovereignty (and it bears it in its entirety).⁹² Even if this post-modern-like

⁸⁹ John C. Hurd, *The Theory of our National Existence* (Boston, 1881) p. 140, 374; Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, 2nd edn. (London, 1886) p. 135 and Lester Bernhard Orfield, *The Amending of the Federal Constitution* (Ann Arbor e.a., 1942) p. 153-155.

⁹⁰ This idea is actually identical to the background theory of the Hungarian Europe-clause, *see supra* n. 73.

⁹¹ Ingolf Pernice, 'Die Europäische Verfassung', *Walter Hallstein-Institut Papers* 12/01 (2001) p. 5.

⁹² This idea could be backed by the use of mixed agreements concluded jointly by EC and member states, *see* a positive law base for it by Art. 133(6), second indent, EC Treaty.

network idea might be seductive from a democratic point of view because of the interesting combination of popular sovereignty of different peoples, it would require the member states to give up their sovereignty. Thus we have to refuse this analogy as well. If we however suggest that in this jumbled aggregate body every part (both EU and member states) retain their own sovereignties (a situation described by Samantha Besson as ‘cooperative sovereignty’), then member states should recognize that they are just one of the competing sovereignties even within their own territories.⁹³ Such a generous renunciation seems rather unlikely either.

The next neutralizing strategy to be examined is the ‘leaving sovereignty itself untouched but forbidding the use of it’ (Germany No. 2 and Hungary No. 2). This would mean that the argument of sovereignty becomes a taboo except for mere rhetorical purposes. Member states are still sovereign, the European Union might be sovereign (or might not be), but we do not use sovereignty as an argument for the solution of concrete conflicts.⁹⁴ Each side has its big gun, but nobody dares to use it, because the consequences are unforeseeable. To use the metaphor by Joseph Weiler, we can call it the cold war strategy.⁹⁵ The problem is that we would need a detailed competence regulation accepted by both sides solving all possible conflicts. Unfortunately, we do not have such a regulation: the European Court of Justice and the national constitutional courts are obviously working with partly different competence regulations.⁹⁶ So, in the taut atmosphere, there is a danger that war will break out every moment; the two sides refrain from using their guns only because of fear. One would rather wish a less risky solution.

We can also try the Austrian abolishing (or disarmament) analogy. This means we have to get rid of the concept. This is the way Neil MacCormick proceeds in his *Questioning Sovereignty* (1999).⁹⁷ He finds that we have reached the era of post-sovereignty; sovereignty as such is outdated. According to him, sovereignty is

⁹³ Samantha Besson, ‘Sovereignty in Conflict’, *European Integration online Papers (EIoP)*, Vol. 8 (2004) N°15 p. 18.

⁹⁴ Similar solutions are known in public international law, e.g., by Art. IV of the Antarctic Treaty on the ‘freezing’ of sovereignty questions and on concentrating rather on concrete problems.

⁹⁵ Joseph H.H. Weiler, ‘The Reformation of European Constitutionalism’, *Journal of Common Market Studies* (1997) p. 125 talks about ‘cold war with its paradoxical guarantee of co-existence following the infamous MAD logic: Mutual Assured Destruction.’ And he continues: ‘For [a national constitutional court] ... to declare a Community norm unconstitutional, rather than simply threaten to do so, would be an extremely hazardous move so as to make its usage unlikely.’ Such a declaration of unconstitutionality would include always (at least implied) references to national sovereignty.

⁹⁶ Josef Isensee, ‘Vorrang des Europarechts und deutsche Verfassungsvorbehalte – offener Dissens’, in *Festschrift Klaus Stern* (München, 1997) p. 1239-1268.

⁹⁷ For a similar suggestion in German literature, see Anne Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin, 2001) p. 148.

‘like virginity, something that can be lost by one without another’s gaining it ...’ – and we do not have to be sad about it (just as with losing virginity ...).⁹⁸ He recommends that we rather simply ignore and dismiss sovereignty. Thus, conflicts between European Union law and national law are to be decided by international law, without recurring to this concept. The obvious problem with this approach is that it awaits national constitutional lawyers giving up the whole idea of national sovereignty. And that will not happen, because the question is beyond rational discussion as it is too politicised and strongly linked to identity.

Finally, we have to explore the possibility of redefinition. One solution could be to define member state sovereignty in the European Union as the right to secession. This means that (presupposing the existence of this right to secession)⁹⁹ member states are still sovereign, but as long as they play the game called European Union they have to follow its rules. The option of secession is there, but no other way of resistance is legitimate, and the supremacy of Union law should be accepted even over national constitutions. Unfortunately, national constitutional courts are not willing to accept this compromise.¹⁰⁰ Therefore, we need a more sophisticated solution that does not require explicitly accepting supremacy of Union law over national constitutions.

Exactly for this reason, the path taken by Neil Walker, in his *Late Sovereignty in the European Union* (2003), is very interesting.¹⁰¹ He argues that we cannot get rid of this concept, because it is in the text of constitutions, and because everybody (lawyers, politicians) is using it. According to him, our task (as legal scholars) is to give a suitable meaning to it. His definition of sovereignty is a ‘claim of exclusive supreme power’. In Walker’s view, this claim has to be (to some extent) effective, so it still has an objective component. We could go even one step further and radicalise Walker’s original idea by fully ‘subjectivising’ this claim.

We could argue as follows: If sovereignty is just a subjective claim, then we have relativised and neutralized it without giving it up, because by introducing this claim-element into the definition, we have changed the Ought concept (e.g., right of supreme law-making) to an Is concept (a body or somebody is just claiming a right). If a body is sovereign, then it does not mean it has the ‘exclusive

⁹⁸ Neil MacCormick, *Questioning Sovereignty* (Oxford, 1999) p. 126. Similar suggestions with less radicalism by Arnaud Haquet, *Le concept de souveraineté en droit constitutionnel français* (Paris, 2004) p. 295-296.

⁹⁹ On the discussion of the problem, see Karl Doehring, ‘Einseitiger Austritt aus der Europäischen Gemeinschaft’ in *Festschrift Schiedermaier* (Heidelberg, 2001) p. 695-704.

¹⁰⁰ From the very newest member state’s sovereigntist case-law, see the Judgment of the Polish Constitutional Tribunal of 11 May 2005, K 18/04, on Poland’s Membership in the European Union (Accession Treaty); and the Judgment of the German Federal Constitutional Court of 18 July 2005, 2 BvR 2236/04, on the European Arrest Warrant Act.

¹⁰¹ Neil Walker, *supra* n. 81, p. 3-32.

supreme power', it simply thinks it has this power.¹⁰² The question of who has in fact (objectively) that power should not be treated, as it is too sensitive and it is not necessary for our goal (i.e., to find a compromise formula keeping the idea of national sovereignty and ensuring in the same time that national sovereignty does not endanger European integration). In this way, the sharpness of a possible conflict has been diminished, but still, it would be better to prevent conflicts between these 'claims'.

So how could we avoid possible conflicts? The answer is given by the theory of contrapunctual law of Miguel Poiars Maduro.¹⁰³ Counterpoint is the musical method of harmonising different melodies: if musicians obey some basic musical rules, then melodies played simultaneously do not have to be the same and still, on the whole, it will result in a musical harmony. According to Maduro, it is possible to reach harmony between two contradictory constitutional narratives in a similar way. The two narratives (national sovereignty and European integration) exclude each other mutually, but if we obey some basic rules, then we can avoid conflicts. These rules are: 1. recognizing the existence of other legal orders and at least the possibility of different viewpoints on the same norms (pluralism), 2. vertical and horizontal discourse among courts in order to achieve consistency in the system (i.e., at least considering the point of view of the respective court from the other legal order in the judgments), and 3. 'universalisability' (i.e., using only arguments that can also be used by the 'other side'). These are the rules the sovereigns should bear as chains, similar to the constitutions limiting how to use sovereignty in internal state-relations. Yet, this is a solution only for preventing conflicts, so there is no answer to the question of how to solve conflicts already arisen – because following from the conflicting paradigms such a secured prevention is not possible.

So, how can we solve on a legal level the conflict between European integration and national sovereignty? What should be our answer to the question concerning sovereignty in the European Union? My point is exactly that it is a misunderstanding that we even should answer the question. The real lawyerly task (as we

¹⁰² This conception also allows *parallel claims* (characteristic to our era of 'late sovereignty') without being forced immediately to decide between them. This new parallelism of claims also means we are facing from a political science perspective an era of post-sovereignty. If traditional sovereignty can be characterised by a homogenous demos, state-centrism, centralism, verticality, representation, command and monism, then post-sovereignty is distinguished by consensus on rights, multilevel solutions, decentralisation, horizontality, participation, deliberation, pluralism, directly deliberative polyarchy, see Richard Bellamy, 'Sovereignty, Post-Sovereignty and Pre-Sovereignty', in Neil Walker (ed.), *Sovereignty in Transition* (Oxford, 2003) p. 189 and Lindahl, *supra* n. 80, p. 90-92.

¹⁰³ Miguel Poiars Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in Neil Walker (ed.), *Sovereignty in Transition* (Oxford, 2003) p. 501-537.

have seen analogically in different constitutional laws) is to neutralize this question. There are times where straight answers are needed – like the 16-17th centuries. And there are times where straight answers are not needed – like now. Or to put it in a more cynical manner: our task is to avoid or to prevent the question, and if someone still poses it, then we should give a ‘solution’ that does not say anything practical for conflicts. Such a practical recommendation might seem disappointing from a scholarly point of view, but any other (straight) ‘solution’ would be unacceptable for at least one player of the game (as we have seen above), so it would just *strengthen* the possibility of conflicts outside of a common argumentative frame we are just trying to build up. If we do not want to strengthen the possibility of such conflicts, but rather to *prevent* them, then our paradoxical lawyerly task is to construe a legal uncertainty as to the legal outcome of a conflict (by developing complicated conceptual constructs which make virtually impossible the straight use of the sovereignty argument) and to give practical methods how to avoid the conflicts, so no one risks the conflict but everyone rather cooperates. Such a compromise strategy is of course useless if a conflict has already broken out. However, at that time, the say will lie with the politicians anyway, and not with us, lawyers. *Inter arma silent musae*. If that time comes, then we have already failed our task of neutralizing the question.

