

THE IMPACT OF THE CONSTITUTION FOR EUROPE ON NATIONAL SOVEREIGNTY

by
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“... a sovereignty over sovereigns, a government over governments, ...; as it is a solecism in theory; so in practice ...”

James Madison, The Federalist Papers, Nr. 20 (1787)

I. Introductory Remarks

The concept of “sovereignty” is primarily rooted in the field of the General Theory of Law and State (which is in this part strongly linked to legal theory) and in Public International Law.¹ As a preliminary approach suffice it to say that it is the notion of a polity’s independence from any other power, especially another power’s dominance. This relates to both its capacity to legislate internally and its ability to govern its external relations.

Regarding the European Union and the European Communities respectively, the prevailing view today, at least in legal writing, is that the Member States still have retained their sovereignty. However, the reasons given are differing. It is widely acknowledged that, in the traditional terms of independence and highest power, such a stance might be questionable. But it is argued that the Community is no state, and that therefore no new state has replaced the sum of the member states. Consequently, international law would be without fully fledged subjects in the fields of community competence. Also, it is said, that the Member States jointly govern the

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1 Among others see *Jellinek* (1882) 16 et seqq; *Brie* (1886), *Jellinek* (1914) 435 et seqq, esp 474 et seqq; *Verdross* (1923) 4 et seqq; *Kelsen* (1920); *Kelsen* (1925) 102 et seqq, *Heller* (1927), *Kunz* (1929) 21 et seqq; *Bindschedler* (1954) 68 et seqq; *Dahm* (1958) 155 et seq, 168; *Harley* (1999) 123 et seqq., *Kelsen* (1960) 330 et seqq; *Koppensteiner* (1963), *Verdross* (1964) 6 et seqq; *Ermarcora* (1970) 351 et seqq; *Verdross* (1964) §§ 31 et seqq; *Seidl-Hohenveldern* (1987) paras 1 et seqq, 631 et seqq.; *de Witte* (1998); *MacCormick* (1999) 123 et seqq., *Oeter* (2002); *Brownlie* (2003) 75 et seq, 287 et seqq.

For the history of the concept of “sovereignty” and the historic functions of the notion (largely excluded in this paper) see the excellent account and further references in *Oeter* (2002) 261 et seqq.

fate of the Community. Therefore, in sum, the Member States are still qualified as sovereign states.²

An argument is also drawn from Article 48 TEU, the provision on Treaty amendments. This provision would allow for any amendments the Member States would wish to establish. Moreover, as the masters of the Treaties (“Herren der Verträge”) the Member States might unanimously decide to alter the treaties even without closely observing the procedural requirements of Article 48.³ But at the same time it is argued that the phenomenon of the European Community necessitates modifying the concept of sovereignty itself. To be a sovereign state, it is said, it is sufficient to establish the absence of another state being superior.⁴

All of the indicated arguments are disputed. For example, good reasons support the position that amendments to the founding treaties are only allowed on the grounds of the procedural provisions of Article 48 TEU.⁵ Another contention is that sovereignty in the formal sense (independence externally and highest power internally) is an outdated concept, or at least unable to describe and explain the specific features of European integration. It is considered to be absent from the legal and political setting of the Union. Instead, it is proposed to talk about “divided sovereignty”, in the sense that sovereignty would either be strictly separated for different topics, or shared, or “pooled” between the Union and the Member States.⁶

Obviously, all of these remarks in their substance depend on the concept of sovereignty itself. Therefore, closer exploration is inevitable. As a prerequisite for closer analysis, however, the relevant provisions of EU Member States’ national Constitutions dealing with “sovereignty” shall be addressed.

II. Constitutional Bases for EU Membership in the Member States

The term sovereignty is used, for example,⁷ in the Czech,⁸ the French, the Greek,⁹ the Italian,¹⁰ the Polish,¹¹ and the Spanish Constitution.¹² However, a number of

2 Compare Zuleeg (2003) Art 1 TEC, para 8.

3 Compare Cremer (2002) Art 48 TEU, paras 4 et seqq.

4 Zuleeg (2003) Art 1 TEC, para. 8.

5 Compare Peters (2001) pp. 452 – 461.

6 Compare MacCormick (1999) 129 et seqq, Oeter (1995) 667 et seqq, 685 et seqq, W. Wallace (1999). See also the criticism in Walker (2003) and Albi/Van Elsuwege (2004).

7 It is not intended to give a comprehensive account of the relevant provisions of Member States’ constitutions in the framework of this contribution; a few examples shall suffice to illustrate the most relevant points. From the vast literature compare e.g. Griller/Maislinger/Reindl (1991), Müller-Graff (1998), de Witte (1998), Kellermann/de Zwaan/Czuczai (2001), Streinz (2002).

constitutions which do not use the term are nevertheless based on the same conceptual ideas. This might be so e.g. in Belgium¹³ and Germany and Hungary.¹⁴ But even very different constitutional settings like in Denmark or the United Kingdom¹⁵ do not produce entirely different results. France, Germany and Denmark shall serve as examples to illustrate the most salient aspects for our context.

The French Constitution of 1958¹⁶ in its preamble solemnly refers “aux principes de la souveraineté nationale” as defined in the *Déclaration des Droits de l’homme et du citoyen* of 1789 and in the preamble of the 1946 Constitution. The former states in its Article 3: “Le principe de toute Souveraineté réside essentiellement dans la Nation.” The latter allows for limitations of sovereignty: “Sous réserve de réciprocité, la France consent aux limitations de souveraineté nécessaires à l’organisation et

- 8 Article 1 paragraph 1 of the Czech Constitution reads: "The Czech Republic is a sovereign, unitary and democratic, law-abiding State, based on respect for the rights and freedoms of man and citizen." According to Article 10a, an international agreement "may provide for a transfer of certain powers of bodies of the Czech Republic to an international organisation or institution".
- 9 Article 1 of the Greek Constitution: "Popular sovereignty is the foundation of government." Article 28 paragraph 3 allows "to limit the exercise of national sovereignty, in so far as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity".
- 10 Article 1 paragraph 2 of the Italian Constitution states that "sovereignty belongs to the people". Article 11 allows for "limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between the nations".
- 11 The term is used in several provisions: the preamble, Article 104 paragraph 2 (prescribing the wording of the oath of the deputies which includes the duty to "safeguard to sovereignty and interests of the State"), and Article 126 (obliging the president of the Republic to ensure observance of the Constitution, "safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory"). According to Article 90, Poland may, "by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters."
- 12 Article 1 paragraph 2 of the Spanish Constitution reads. "National sovereignty belongs to the Spanish people from whom emanates the powers of the State." Article 93 does not repeat the term, but allows for the "conclusion of treaties which attribute to an international organisation or institution the exercise of competences derived from the Constitution".
- 13 According to Article 33 paragraph 1 of the Belgian Constitution, "All power emanates from the nation." Article 34 foresees that the "exercising of determined power can be attributed by a treaty or by law to international public institutions."
- 14 Article 2A of the Hungarian Constitution reads: “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.”
- 15 On a completely different constitutional basis compared to other EU members, and in a dualist tradition, similar result like in France are reached for the United Kingdom; see e.g. *Hartley* (1999) 168 et seqq., discussing the doctrine of “Sovereignty of Parliament”.
- 16 For the following compare e.g. *Jacqué* (1992); *Rideau* (1992); *Chaltiel* (1998).

à la défense de la paix.” Article 3 para. 1 of the Constitution -- enshrined in Title I with the heading: “de la souveraineté” -- reads: “La souveraineté nationale appartient au peuple qui l’exerce par ses représentants et par la voie du référendum.” The Constitution also explicitly authorises EU membership in Article 88-1: “La République participe aux Communautés européennes et à l’Union européenne, constituées d’États qui ont choisi librement, en vertu des traités qui les ont instituées, d’exercer en commun certaines de leurs compétences.”

In the Seventies, and before the insertion of the last mentioned provision in 1992, this situation led the Conseil constitutionnel to differentiate between “limitations” and “transfer” of sovereignty. The former appeared to be allowed, the latter forbidden under the Constitution. In 1992, when it came to the scrutiny of the Maastricht treaty, the Conseil constitutionnel changed its rhetoric. It held that the *respect of national sovereignty* itself forms no obstacle to the *transfer of competences* with the consent of the member states of an international organisation (especially the EU). However, should an international obligation include a provision contrary to the Constitution or *detrimental to the essential conditions for the exercise of national sovereignty*, an amendment of the Constitution is necessary before ratifying the respective treaty.¹⁷ The court confirmed this view in 1997 when it had to scrutinize the constitutionality of the Amsterdam treaty.¹⁸ On the basis of this reasoning, the Constitution was amended in order to insert the mentioned “membership clause” and to authorise the specified transfer of competences by the Maastricht and the Amsterdam treaty.¹⁹ The core aspects of scrutiny appear to be the *field* of the respective competences to be transferred and the *modalities* of their use (especially any transition from unanimous voting to majority voting at European level).²⁰

This can only mean that the Conseil constitutionnel differentiates between sovereignty itself and the essential conditions for the exercise of national sovereignty. It opines that first, the French Constitution requires the respect for national sovereignty, and second, that the transfer of competences in principle is not in conflict with this requirement. Third, should such a transfer of competences be detrimental to the essential conditions for the exercise of national sovereignty, the Constitution has to be previously amended;²¹ however, this would still happen in respect of national sovereignty as such.

17 Décision no 92-308 DC du 9 April 1992: “... le respect de la souveraineté nationale ne fait pas obstacle” to join an international organisation “investie de pouvoirs de décision par l’effet de transferts de compétences consentis par les Etats membres”. Should such agreements include “une clause contraire à la Constitution ou portent atteinte aux conditions essentielles d’exercice de la souveraineté nationale, l’autorisation de les ratifier appelle une révision constitutionnelle”.

The reference to the *exercise of national sovereignty* might be associated with the famous dictum of the PCIJ in the *Wimbledon* case – compare below fn 87.

18 Décision no 97-394 DC du 31 décembre 1997, paras. 6 and 7.

19 Compare Article 88-2 and 88-3 of the Constitution.

20 Décision no 97-394 DC du 31 décembre 1997, para. 9. Compare also *Chatiel* (1998) 77 et seq.

21 This is not in all instances the case: see e.g. *Rideau* (1992) 30.

Consequently, the transfer of competences to the EU is not, according to the Conseil constitutionnel, diminishing French sovereignty itself.²² It can, if essential conditions for the *exercise* of national sovereignty are at stake, however be necessary to authorise such a transfer by constitutional law. The difficult question if and at what point such a transfer of competences might impact on national sovereignty itself, and what the legal consequences were in such a case, is not answered by the court. The essential aspect of relevance for our context, however, is the mentioned differentiation between the respect for sovereignty itself and the essential conditions for the *exercise* of national sovereignty. Even if the transfer of competences necessitates passing a constitutional law, sovereignty itself remains respected. This would be up to the, not specified, point when the transfer of competences would not respect national sovereignty any more.

In essence, this means that sovereignty itself is, in principle, not at stake in the course of European integration. As long as the constitutional requirements for the transfer of competences to the EU are met, sovereignty as such²³ appears to be respected. Instead, only *essential conditions for the exercise of national sovereignty* are affected. However, it is abundantly clear from the reasoning of the Conseil constitutionnel that it estimates the legal framework for national legislation as being substantially affected by the transfer of competences to the EU. Taken altogether, this can be seen as a reference to a formal notion of sovereignty which remains intact as long as the transfer of competences to an international organization is being authorised by the Constitution, be it directly or indirectly.

Moreover, abandoning the French Republic as a State under international law is not even addressed in the relevant provisions of the Constitution. It can only be concluded that such a possibility is not foreseen in the law as it stands. This is so in most of the constitutions of EU members, at least in those provisions which formed the basis of EU membership.²⁴ Consequently, upholding the quality of a sovereign State under international law is an implicit constitutional duty. This might in some cases be changed by amending the Constitution. However, as long as this has not happened, national constitutions rest on the assumption that EU membership would not change the quality of the State as a subject of international law.

A similar result as in France was reached, on a completely different constitutional basis, by the German Constitutional Court (*Bundesverfassungsgericht*). Article 20

22 See for a brief discussion of this point *de Witte* (1998) p. 295 et seq. with further references.

23 For the purpose of the above deliberations, we need not in detail address the point that the French Constitution is very explicit in making the French *people* the subject of sovereignty. This refers to the issue of the bearer of sovereignty (the people, the emperor, the state) which is of secondary concern for our context. Regarding the interconnectedness of internal and external aspects of sovereignty under the French Constitution e.g. *Chaltiel* (1998) 76.

24 For an account at that time compare *Griller/Maislinger/Reindl* (1991) pp. 19 (Germany), pp. 36 (Italy), pp. 47 (France), pp. 58 (Belgium), pp. 63 (Netherlands), pp. 68 (Luxembourg), pp. 72 (Denmark), pp. 77 (United Kingdom), pp. 83 (Ireland), pp. 90 (Greece), pp. 97 (Spain), pp. 100 (Portugal); compare also the summarising conclusions at pp. 239. The broadest discussion had taken place in Germany.

paragraph 2 first sentence of the Constitution (the Basic Law/Grundgesetz) reads: "All State authority emanates from the people." Article 24 paragraph 1, on which EC membership was originally based, allows to "transfer sovereign powers²⁵ to intergovernmental institutions" by legislation. Article 23 paragraph 1 of the Basic Law which explicitly allows for EU membership, was only inserted in 1992. It reads as follows:

"To realize a unified Europe, Germany participates in the development of the European Union which is bound to democratic, rule of law, social, and federal principles as well as the principle of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution. The federation can, for this purpose and with the consent of the Senate [Bundesrat], delegate sovereign powers.²⁶ Article 79 II & III is applicable for the foundation of the European Union as well as for changes in its contractual bases and comparable regulations by which the content of this Constitution is changed or amended or by which such changes or amendments are authorized."

The Constitutional Court in its so called Maastricht judgement, when stressing that the TEU establishes a federation of States²⁷ and not a state, expressly emphasized that the Union and the Communities are only equipped with specific competences and powers, in accordance with the principle of limited individual competences.²⁸ This, the Court concludes, does not give the Union or the Communities a power to determine their *own* competences (Kompetenz-Kompetenz), which would, according to the Court, violate the German Constitution. Therefore, the Union, according to the Court, is a compound of states (*Staatenverbund*), the common authority of which is derived from the Member States themselves. These Member States could, as "Masters of the Treaty", even revoke adherence to the Union by an *actus contrarius*. Thus, Germany, in the perception of the *Bundesverfassungsgericht*, preserves the quality of a sovereign state in its own right,²⁹ despite of the substantial transfer of competences to the EC in the Maastricht Treaty.

25 However, the German version does not use the term "Souveränität", but speaks of "Hoheitsrechte", which can be transferred to "zwischenstaatliche Einrichtungen".

26 Also here, the German original does not use the wording "sovereign powers" but "Hoheitsrechte" instead.

27 The Court uses the term *Staatenverbund* instead of the more common term *Staatenverbindung*. *Staatenverbund* might be better translated as "compound of states" and not federation of states. The significance of this denomination shall not be discussed in depth here as, it is submitted, the question is not of vital importance for this discussion. Arguably, the Court wanted to express its reservations on the notion of a possible legal personality for the Union, but wanted to avoid further emanations on the possibility of federations of states without legal personality.

28 BVerfGE 89, 155, at 192 et seq.; CMLRev 1994, 251, at 258.

29 BVerfGE 89, 155, at 190; CMLRev 1994, 251, at 258 et seq.

Also in countries where the situation might at first sight appear completely different, caution is necessary. In Denmark, Article 20 of the Constitution allows for the passing of a Statute “delegating” powers vested in the authorities of the Realm to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation. The provision serves as the basis for EU membership. The Supreme Court had to deal, among others, with the allegation that the jurisdiction of the ECJ would prevent Danish courts from enforcing the limits for the transfer of sovereignty which took place by the Act of Accession and the demand for specification under Article 20 of the Constitution. The court answered that Danish courts can generally base their decision on the validity of EC legislation on decisions of the ECJ on such questions “being within the limits of the surrender of sovereignty”. However, the Supreme Court deducted from the demand of specifications in Article 20 of the Constitution, that the courts of law cannot be deprived of their right to try questions as to whether an EC act of law exceeds the limits for the “surrender of sovereignty” made by the Act of Accession. Therefore, Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Act of Accession. Another allegation was the eventual violation of a democratic system of government by the “transfer of sovereignty” in accordance with the Act of Accession. In this regard, the Supreme Court noted “that any delegation of part of the Parliament’s legislative powers to an international organisation will involve the certain encroachment on the Danish democratic system of government.”³⁰ The main issue in the case was democracy, and the Supreme Court dismissed the claim that EC membership was unconstitutional in this respect. Nevertheless, the court made it clear that also the surrender of fundamental rights protection is outside the constitutional authorization as applied by the Act of Accession, without elaborating on this point.

At first sight, the rhetoric of the constitutional text (“surrender of sovereignty”) goes beyond those in Germany and France. By contrast, however, the understanding applied in Denmark by the competent authorities and the Supreme Court might even be stricter. Compromising fundamental rights protection appears to be unconstitutional, and nobody would read the Constitution to the end that abandoning Danish

It should probably be added that the referred Article 79 para. 3 of the Basic Law makes Amendments of the Constitution “affecting the division of the Federation into States [Länder], the participation on principle of the States [Länder] in legislation, or the basic principles laid down in Articles 1 and 20 inadmissible”; and that according to Article 20 Germany is “a democratic and social federal state” where all “state authority emanates from the people” and is being exercised “by the people through elections and voting and by specific organs of the legislature, the executive power, and the judiciary”.

³⁰ Judgment of 6 April 1998, *Carlsen/Rasmussen*, I 361/1997, UfR 1998, 800. English translation taken from *Due* (1999) pp. 320 – 325.

statehood for the sake of European integration could be legal under Article 20 of the Constitution.³¹ The Supreme Court stressed that Article 20 of the Constitution “precludes that it can be left to the international organisation to make its own specification of its powers”. Moreover, it “must be considered to be assumed in the Constitution that no transfer of powers can take place to such an extent that Denmark can no longer be considered an independent state”.³² Taken altogether, the Danish Constitution might be more “realistic” in the sense that it expressly addresses the material changes in the concept of sovereignty. Nevertheless, it affirms the constitutional requirements to preserve Denmark as a sovereign State under international law. In this respect also the Danish Constitution refers to the concept “independence” as an attribute of a sovereign State.

A salient point of the constitutional development over the centuries has been the issue of the holder or the subject of sovereignty.³³ The main alternatives -- the monarch, Parliament, the people, the nation, or the State as a whole --, heavily disputed over time, to a certain extent give a clue on the struggle for power, be it internally between the monarch and the nobles, or Parliament as the representative of the people or the nation, be it externally against the Pope or the empire.

In Europe, this discussion is somehow outdated given that democracy is a common constitutional principle not only to all EU Member States but to all members of the Council of Europe. This development materialises in constitutional clauses attributing “sovereignty” or “power” to the people,³⁴ or to the nation,³⁵ or, obviously in an effort balancing conflicting alternatives, to the people and the nation.³⁶

Arguably, however, this does not necessarily beg for the conclusion that nowadays sovereignty lies inevitably with the people (*Volkssouveränität*), and that all

31 E.g. *Due* (1999), p. 326 et seqq, *Høeg* (1999) at p. 86.

32 The Supreme Court added: “the determination of the limits for this must rely almost exclusively on considerations of a political nature. The Supreme Court finds it beyond any doubt that by the Act of Accession no sovereignty has been transferred to the community to such an extent that it is in violation of the said assumption in the Constitution.”

33 See for the following esp. see *Jellinek* (1882) 24 et seqq, *Kelsen* (1925) 95 et seqq, *Kunz* (1929) 21 et seqq, *Ermarcora I* (1970) 356, *de Witte* (1998) 279 et seqq.; *Oeter* (2002) 265 et seqq.

34 E.g. Article 2 para. 1 Czech Constitution: “The people are the source of all power in the State; they exercise it through bodies of legislative, executive and judiciary power.”; Article 20 para. 2 German Basic Law: “All state authority emanates from the people.”; Article 1 para. 2 Greek Constitution: “Popular sovereignty is the foundation of government.”; Article 2 para. 2 Hungarian Constitution: “In the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives.”; Article 1 para. 2 Italian Constitution: “The sovereignty belongs to the people who exercise it in the forms and limits of the constitution.” Article 1 para. 2 Spanish Constitution: “National sovereignty belongs to the Spanish people from whom emanate the powers of the state”.

35 E.g. Article 33 para. 1 Belgian Constitution: “All power emanates from the Nation.” Article 4 para. 1 Polish Constitution: “Supreme power in the Republic of Poland shall be vested in the Nation.”

36 Article 3 para. 1 French Constitution: “La souveraineté nationale appartient au peuple qui l'exerce par ses représentants et par la voie du referendum.”

other alternatives should be discarded.³⁷ The better conclusion might be that the mentioned alternatives reflect the allocation of power within a polity, that is to say they reflect the differences between alternative political systems. It is only natural that in a democracy power rests with the people, even if this is to a certain extent fictitious also in democracies where the people is usually represented in Parliament (and passing a law usually involves also other organs like the head of state), and where in elections and in the case of referenda not all are entitled to cast their vote. However, this should not be confounded with the concept of ultimate power itself. An adequate way to do so might be to ascribe sovereignty to the polity as such, or, to be more precise, to the normative order of that polity which in most cases would be the State.³⁸ This would also correspond better to the necessities of international relations: external sovereignty almost has been attributed to the State as such irrespective of the organs empowered to make use of it.

The mentioned alternatives (monarch, Parliament, people, nation) consequently would indicate which *organ* or *legal entity* within the State is entitled to make use of the sovereign rights of the State. In many instances this is certainly not one organ or one legal entity alone, but a number of organs within a power sharing system. It might then be tempting to characterise such a system as one of divided sovereignty. At the same time that would be confusing since the division of power or labour within the polity is of course different from the power of the polity itself taken as a whole.

III. Concepts of Sovereignty

1. Sovereignty as Independent and Supreme Authority

a. The Classical Authorities Revisited: Jellinek and Kelsen³⁹

In General Theory of Law and State sovereignty generally means that State authority⁴⁰ is independent and supreme. The first component mainly captures the external (external or international sovereignty) the second the internal dimension (internal or

37 Possibly pointing into that direction with regard to the EU *Albi/Van Elsuwege* (2004) p. 755 et seqq.

38 This is the solution especially offered by *Kelsen* (1949) at p. 383 et seqq.; see also *Kunz* (1928) at 25 et seqq.

39 Both authors are quoted here in their function as representatives – although sometimes of diverging opinion - of a concise and widely acknowledged conception of sovereignty. However, the following analysis is not designed to draw a comprehensive picture of the relevant academic discussion in this field. See in this respect *Kunz* (1929) 21 et seqq.

40 Regarding the holder or the subject of sovereignty see above in the text near fn 33.

constitutional sovereignty).⁴¹ The specific content of the enacted law is irrelevant. In so far this is a formal concept of sovereignty.

Jellinek argued that both aspects of sovereignty are complementary: A supreme authority depending on another authority is not supreme, not even for its subordinates who are indirectly subject to the second authority through their subordination to the first one. In return, the notion of an independent authority logically includes the concept of supremacy, since independence implies the absence of being out-ranked.⁴² The essential criterion of this concept of sovereignty is the lack of any higher ranking -- in the sense of: legally foundational -- normative order as compared to the given statal order. With regard to the transfer of legislative powers to international bodies including international organisations like the future Union the crucial question is whether the absence of international obligations and retaining the specification of competences are inalienable elements of state sovereignty. If so, any transfer of powers would inevitably entail the loss of sovereignty.

Jellinek qualified obligations of a State as being compatible with its sovereignty, as long as they can be looked at as self-binding.⁴³ It was particularly public international law which came under this qualification. His attempt to thereby ban the misleading idea of boundlessness from the notion of sovereignty by qualifying sovereignty as exclusive ability of legal self-determination and self-engagement⁴⁴ certainly finds itself in direct opposition to the view of sovereignty as independent authority. Otherwise his modification could not alter the non-binding character of international law in the sense of the absence of superior norms.⁴⁵

Hence, the formal notion of sovereignty always leads to the qualification of international legal obligations to be generally revocable by the state at any time. There seems to be only one – and only a theoretical – possibility to modify this result, namely by linking the concept of self-binding law with a particular occurrence of the so-called *Kompetenz-Kompetenz* or *Kompetenzhoheit*. This is understood by *Kelsen* as the ability of state authority to autonomously determine its competence, that is: its sphere of activity.⁴⁶ Following his view the option of amendment is not an essential

41 See *Jellinek* (1882) 22 et seqq, *ibid* (1914) 475, *Ermacora* (1970) 357 et seqq. *Kelsen* (1949) 383, wrote: „[t]he most important consequence of the theory which proceeds from the primacy of national law is that the State whose legal order is the starting point of the whole construction can be considered to be sovereign. For the legal order of this State is presupposed to be the supreme order, above which no other legal order exists.”

42 See *Jellinek* (1882) 22 et seqq, and *Jellinek* (1914) 475. *Kelsen* (1949) 385 denoted this concept as “sovereignty as exclusive quality of only one order”. In the German original text, (1925) 107, he explained: “Ist der Staat souverän, dann ist alles Rechtliche notwendigerweise ‘Innen’. Und gibt es ein Außen, d.h. gibt es außerhalb des Staates noch eine Rechtssphäre, dann kann der Staat nicht mehr souverän sein.” See also *Kelsen* (1920) 37.

43 See *Jellinek* (1880) 9 et seqq, *Jellinek* (1882) 34, *Jellinek* (1914) 481.

44 See *Jellinek* (1914) 481; the German original speaks of “ausschließliche Fähigkeit rechtlicher Selbstbestimmung und Selbstbindung”.

45 This consequence is rightly drawn by *Kelsen* (1920) 52.

46 See *Kelsen* (1920) 47. The German original speaks of “die Fähigkeit der Staatsgewalt, ihre Kompetenz, d.h. ihren Wirkungskreis selbst zu bestimmen”: *Kelsen* (1925) 107.

feature of the legal order. On the contrary: amendments are only allowed in the case of provisions specifically allowing for amendments.⁴⁷ Taking this point seriously might open the option to make international obligations indissoluble, generally accepted rules of public international law like “*pacta sunt servanda*”, but also concrete treaty obligations. In this case the State, still only on the grounds of constitutional norms, could not unilaterally escape from international obligations. Yet this restraint would not alter its sovereignty in the sense of *Kelsen*. Admittedly, this is just a theoretical option. Moreover, it appears to be inapplicable to the transfer of competence-competence to international bodies. Otherwise, the concept of a national norm as the highest norm would become devoid of content.

Summing up, the transfer of powers to intergovernmental entities including supranational organisations does not compromise sovereignty in a formal sense. *Kelsen* emphasised that the sovereign state can fully acknowledge public international law and thereby curtail “its sovereignty”, which now means: its “freedom of action”. It is exclusively on the basis of the content of public international law to judge upon the acceptable degree of restriction, but not from the notion of sovereignty. The extent to which state sovereignty as the freedom of action of a State may be restricted is not limited by public international law. By concluding an international treaty one may create an international organisation which is so centralised that it is itself a State, depriving the incorporated States of their character as States. To what extent a government is entitled or shall restrain its freedom of action by concluding international treaties is a question of politics.⁴⁸ This can only mean that apart from the limit set by *Kelsen*, namely the integration into a new State, any subordination to the decision making of international bodies is of political and probably of constitutional relevance, but irrelevant for State sovereignty. The conclusion with regard to the new Constitution is that the transfer of powers to the Union does not affect the sovereignty of the Member States, as long as the Union does not become itself a new State.

47 For a more detailed analysis see *Kelsen* (1920) 49. To give some examples for possible norms which may not be amended he referred to provisions governing the role of the highest authorities of the State, on the “extent” of the legal order and on the delimitation of competencies between the federal State and its Member States.

48 According to *Kelsen* (1949) 253 et seq. “[t]here are, however, important restrictions to the rules of international law by which the autonomy of the States is established. There are ... international treaties which, according to general international law, impose duties and confer rights upon third States. (...) By a treaty an international agency may be established in which only a part of the contracting States are represented and which is authorised by the treaty to adopt by majority vote norms binding upon all the contracting States. Such a treaty is not incompatible with the concept of international law or with the concept of the State as a subject of international law; and such a treaty is a true exception to the rule that no State can be legally bound without or against its own will.”

b. Critical Remarks

First of all, the expedience of *Kelsen's* notion of sovereignty⁴⁹ is vulnerable to the general argument against construing the relation between international law and national law in a dualist manner or in a monist way with the primacy of *national* law: self-engagement does not allow for the existence of (contractual) rights and obligations between “subjects of international law”,⁵⁰ for the sovereign State never forgoes its right to unilaterally withdraw from its international obligations irrespective of their content. A legal obligation can only exist if e.g. a treaty can be based on a binding norm which is not at the disposition of either of the partners. However, this scenario presupposes the existence of a legal order superior to the national legal order, or at least an international legal order which is not subordinated to national law.⁵¹

Furthermore one has to point to the weak explanatory power of the formal concept of sovereignty resulting from the mentioned possibility to combine self-binding norms and continuity. The degree of independence could in extreme cases – as indicated by *Kelsen* himself - be reduced to the irreversible subordination, by national legislation, to the decisions of an international organisation covering a broad range of fields. As long as the very norm encapsulating this subordination is enacted by the State and must not be altered, it remains, according to *Kelsen*, the highest norm and thus maintains national sovereignty. This could only be changed by stipulating limits *for the content* of these international obligations. However, *Kelsen* explicitly refuses to accept such an approach by referring to its alleged political character. Under the conditions of the high degree of interconnectedness and legal integration of today, the formal concept of sovereignty comes near a meaningless construct which is able to draw a dividing line between States and non-State actors – however only the basis of a monistic system with primacy of national law – but is not suited to illustrate the manifold nuances of mutual dependencies of today's international community. The creators of this concept are not to be blamed for what might be seen as a deficient proposal since they have never claimed it to be comprehensive. However, with regard to the phenomenon of the transfer of powers to international bodies in general and to the European Union specifically, formal sovereignty is not explaining much, and thus not a fruitful concept.

49 As long as it is not ascribed to the international legal order (which is *Kelsen's* alternative), but to the nation state, as in the above text.

50 The quotation marks indicate that under such a construction foreign States have to be qualified as parts of the inner-state legal order. As a result it would be consequent to address them as State bodies.

51 Among others *Kunz* (1929) 54 et passim; *Guggenheim* (1948) 23 et seq. *Koppensteiner* (1963) 34 et seqq.

2. Sovereignty as Direct Subordination to Public International Law

a. Exposition

Especially scholars of public international law argue that a State acquires the status of sovereignty as soon as “it is, with regard to its members and its territory, the supreme authority whose directives and decisions may not be challenged at a higher level (*internal sovereignty*)” and as long as the States in their mutual relations are not subordinated to a higher ranking power but to public international law based on intergovernmental consensus (*international sovereignty*).⁵² This concept ascribes the quality of the highest legal order to public international law not to the States as in the foregoing section. The “loss” of the highest and autonomous authority resulting from the subordination to international law renders internal sovereignty “the rest” which is left for the State. Some authors stipulate in addition that the State has to enjoy the main part of political decision-making power.⁵³ It goes without saying that internal sovereignty in this sense deviates in the essential point (highest authority) from the concept sketched out in the last section. Moreover, internal sovereignty may be curtailed by the use of the so-called international sovereignty, i.e. through the entering into international obligations e.g. establishing intergovernmental control mechanisms like in the realm of human rights protection (ECHR), or entering into the obligations of an EU member.

The transfer of legislative powers to international bodies including the European Union generally does not affect sovereignty in this sense.⁵⁴ The status of being directly submitted to public international law is not abolished with regard to Member

52 See *Verdross-Simma* (1984) § 35, the German original reads that “die Staaten untereinander keiner überstaatlichen Macht, sondern bloß dem vom zwischenstaatlichen Konsens getragenen Völkerrecht untergeordnet sind (völkerrechtliche Souveränität)”. For more details see *Verdross* (1923) 4 et seqq, esp 15 et seq, 31 seqq, *Kunz* (1929) 36 et seqq, *Koppensteiner* (1963) 35 et seqq, *Seidl-Hohenveldern* (1987) paras 5 et seqq, and paras 631 et seqq.

It is not intended to discuss *Kelsen's* notion in (1968) 2275 of direct subordination to international law, where he partially renounces his former terminology, however, in this author's opinion, without any substantial modification of his findings. By contrast, the authors quoted above start their analysis from a monistic conception of the relationship between national law and international law with primacy of public international law. Moreover it has to be clarified that, following the second conception of the relation between public international law and constitutional law, namely the monistic one with primacy of public international law, it is not necessary to care about decreasing sovereignty through international commitments: in this case the State would lack sovereignty from the beginning which in return, would be exclusively applicable to international law itself.

53 See *Bindschedler* (1968) 174, *Verdross-Simma* (1984) § 38. For critical remarks on the partially overlapping notions of legal and political sovereignty see *Koppensteiner* (1963) 39 et seqq.

54 For more details with regard to sovereignty and territorial sovereignty see *Seidl-Hohenveldern* (1964) nr. 1110 et seqq; *Bleckmann* (1978) 173 et seqq, *Verdross-Simma-Geiger* (1980) 223 et seqq, *Verdross-Simma* (1984) §§ 1022, 1038 et seqq, *Brownlie* (2003) 287 et seqq.

States of an intergovernmental institution, as long as this is no integration into a new State. Within the subsequent subchapters this will be further exemplified with regard to EU membership and discussed as for the consequences.

Before that the issue shall be addressed that direct subordination to international law could be denied for highly integrated international organisations, especially for members to the EU, on the grounds of their legal nature. The argument could be that the legislative acts of such international organization do neither belong to the sphere of public international law nor to that of national law and thus are located in between these two orders.⁵⁵ It is well known that such a position is taken by the ECJ claiming that EC law is an autonomous legal order.⁵⁶ The stance has been supported by a number of writers.⁵⁷ On these grounds and in the case of a massive and important transfer of decision-making rights as within the European Union one might accept a limitation or even a loss of national sovereignty. The reason would be that the members to such an organisation are subordinate not directly to international law, but to a legal order distinct from international law. Indeed, EU-members might, on the basis of such a position, be compared to the components of a federal state with the only difference that their relation to international law is not mediated by state law but by EU law.

However, the premise of this stance is not shared here. It is submitted that the European Union today is and under the new Constitution would be a highly integrated, supranational legal order, albeit still established under international law. The main reason for this contention is that the legal fundament is and would continue to be international treaties, and that the Union continues to legally exist on the grounds of these treaties. There is no convincing argument to sharply discern between the founding treaties as the legal condition (*rechtliche Bedingung*) for the existence of the Union, and the legal foundation (*Geltungsgrund*) of its system which might solely for this differentiation be “autonomous”.⁵⁸ On the basis that the EU (and the EC) remained and the EU under the new Constitution would continue to be a (highly integrated) international organisation, granting legislative powers to this organisa-

55 Among others see *Miehsler* (1973) 68.

56 The ECJ, in Case 26/62, *van Gend en Loos*, 1963 ECR, 1 at 12, stated that “...the Community constitutes a new legal order of international law” (emphasis added). Later, the Court changed its rhetoric by calling the TEC an independent source of law (Case 6/64, *Costa v ENEL*, 1964 ECR, 585 at 593 f; Case 11/70, *Internationale Handelsgesellschaft*, 1970 ECR, 1125, para. 3). However, the Court never explained in which respect the treaty could be “independent” from international law apart from forming a *special* international community.

57 From the literary discussion see only the attempt to create a theoretical foundation for the jurisprudence of the ECJ by *Ipsen* (1972) 63. *Stern* (1984) 540 (with further references) contends that supranational law is a phenomenon which does neither belong to international law nor to national law but which constitutes a third element, something original and autonomous. This represents the common view.

58 Compare the critique e.g. in *Griller* (1989) 573 et seqq., *Hartley* (1999), 123 et seqq., 149 et seqq., 163 et seqq., *MacCormick* (1999) 127 et seqq. See also *Verdross* (1964) 222, *Bernhardt* (1973) 21 et seqq.

tion does not trigger the chain of arguments sketched out above and consequently to a restriction or even the loss of sovereignty.

It is in line with this stance that according to the prevailing view, States as members of international confederations remain sovereign as long as they are able, on the basis of international law, to unilaterally withdraw from them.⁵⁹ Be that as it may on the grounds of the current treaties,⁶⁰ it is obvious that the Constitution for Europe would, by explicitly guaranteeing the right of withdrawal,⁶¹ foster the respective room of manoeuvre of the Member States.

b. A Meaningless Concept?

It goes without saying that the proponents of the concept of sovereignty as direct subordination to international law [*Völkerrechtsunmittelbarkeit*] are well aware that different types of international obligations, particularly in the framework of inter-governmental organisations, produce a multifaceted variety of restrictions on the side of the States. As a consequence one might differentiate between two types of States, those with normal and those with restricted competencies. However, as *Kunz* observed, there is no strict criterion at what moment a sovereign State has to be classified as a sovereign State with normal competencies or as a sovereign State with restricted competencies. It is primarily a matter of taste and that of the prevailing opinion whether one designates international, competence-restricting treaties -- and any international treaty restricts national competencies, as he adds -- as treaties preserving, for the involved States, the status as sovereign States with normal competencies, or as treaties transforming them to sovereign States with restricted competencies.⁶²

59 See *Bindschedler* (1954) 72 et seqq, *Koppensteiner* (1963) 70 et seq, *Verdross* (1964) 193 et seq, *Seidl-Hohenveldern* (1984) paras. 0502, *Verdross-Simma* (1984) § 36.

60 Good arguments strike for the position that unilateral withdrawal would be illegal: Compare *Peters* (2001) 141 et seq.; but compare also the opposite view in *Hartley* (1999) 164 et seq., 174.

61 Article I-60 TCE.

62 *Kunz* (1929) 59 et seq; the German original reads as follows “Dabei muss aber hervorgehoben werden, dass es kein festes Kriterium gibt, wann ein souveräner Staat unter die souveränen Staaten mit normaler und wann unter die souveränen Staaten mit beschränkter Kompetenz einzureihen ist. Es ist mehr Geschmacksache und Sache der herrschenden Anschauung, ob man völkerrechtliche – die Kompetenz beschränkende Verträge – und diese Kompetenz beschränkt jeder völkerrechtliche Vertrag – als solche bezeichnet, welche die verpflichteten Staaten noch als souveräne Staaten mit normaler Kompetenz bestehen lassen, oder schon zu souveränen Staaten mit beschränkter Kompetenz machen”. See also *Verdross* (1926) 125. According to both authors Member States of confederations belong to the group of States having only restricted competencies.

Therefore, *Kunz* clearly identified the relativity between normal and restricted competence, thus defending the decisiveness of the criterion of direct subordination to international law [*Völkerrechtsunmittelbarkeit*]. In this author's view it is therefore not justified blaming him of inconsistency, as was done by *Bindschedler* (1954) 70 et seq.

In essence, this is corresponding to the famous decision of the Permanent Court of International Justice in the *Wimbledon* case:

“the Court declines to see in the conclusion of any Treaty ... an abandonment of ... sovereignty. No doubt any convention creating an obligation ... places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.”⁶³

Sovereignty in the sense of direct subordination to public international law -- and apart from that unrestricted internal power -- arguably is the underlying rationale of many Member States’ constitutions, even if the term “sovereignty” is in most cases not expressly used.⁶⁴ Based on the position mentioned above that sovereignty can be restricted without being affected in substance, EU member states could be qualified as sovereign States with restricted competencies. Obviously, substantial restrictions (limitations)⁶⁵ of sovereignty by transferring competencies to the EC and the EU respectively were the condition for membership. This was specifically emphasised by the ECJ in the case *Costa/ENEL*:

“By creating a Community of unlimited narration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a *limitation of sovereignty* or a *transfer of powers* from the States to the community, the member states have *limited their sovereign rights*, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.”⁶⁶

However, no immediate further consequences would follow from the restriction of competences, especially regarding the legal capacity and status of the Member States under international law. The restrictions would of course be relevant regarding the legal obligations between EC members,⁶⁷ but would in principle not affect the legal capacity vis-a-vis third countries. Against this background, it could be objected that such a concept of sovereignty does not reflect the many nuances of comprehensible and actual restrictions under international law, and especially not the substantial changes within the EU. A concept insensitive to such important variations could be considered meaningless and ripe for being discarded.

However, such a fundamental critique appears to be pre-mature in at least one important respect. At stake is the consequence of an entity being qualified as a “sov-

63 PCIJ Series A no 1 [1923] 25.

64 Compare above chapter II. It might even be defensible, especially in countries with a dualist tradition, to reconstruct the respective constitutional provisions in the sense of sovereignty as independent and supreme authority as explained in the previous subchapter; this point shall not be deepened here; but compare with regard to the United Kingdom *Hartley* (1999) 168 et seqq.

65 E.g. *de Witte* (1998) p. 281 et seqq.

66 Case 6/64, *Costa/ENEL*, [1964] ECR, 585, at p. 593 (italics added). The original French version does not use the word “souveraineté”, but “limitation de compétences” and “transfert d’attribution des Etats à la Communauté”.

67 In the case of the EC, this included the notion of supremacy and direct effect: compare, also regarding the close link to the sovereignty debate, *de Witte* (1998) p. 287 et seqq.

ereign” state under international law (even with restricted competences), or as something different, be it a “state” within a federation, or be it a component of an international organisation depriving it of its legal capacity under international law.⁶⁸ If we agree that one of the most salient features for a “sovereign” state is the existence or the non-existence of legal personality *under international law* with all its repercussions – e.g. the ability to enter into international agreements, including membership rights in international organisations, liability under international law for wrong doing, exclusive jurisdiction, the protection flowing from the prohibition of the use of force and the right of non-intervention –, it becomes abundantly clear that the point is of vital importance for the Member States of the Union, and still remains to be even against the background of the obligations resulting from EU membership.⁶⁹ Retaining the status of “sovereign” States makes sure that the bundle of legal rights and obligations under international law are still available, in contrast to entities not being sovereign in this sense. Legal certainty not only for EU Member States but also for all other States in the world is thus preserved. This is the more the case as long as the Union itself is not in the legal condition taking over as a *fully fledged*, “sovereign” member of the international community.⁷⁰ And this arguably is not the case until the Union itself will acquire not necessarily the status of a State, but alternatively an international organisation acquiring, under the acceptance of the international community and the Member States, the whole “bundle” of sovereign rights from its members.⁷¹ For, international law, and in this point in conformity with general theory, does not offer a third alternative to confederations – international organisations being captured by that notion – and (federal) states.⁷² Summing up, the difference between being a state *directly* subordinate to international law and

68 Compare for the following e.g. and especially *Oeter* (2002) 275 et seqq., 283 et seqq., with further references; *Brownlie* (2003) pp. 287. But compare already also *Kelsen/Tucker* (1966) pp. 259.

According to *Brownlie* (2003) at 287, “sovereignty is in a major aspect a relation to other states (and to organisations of states) defined by law. The principal corollaries of sovereignty and equality of states are: (1) jurisdiction, prima facie exclusive, ...; (2) the duty of non-intervention in the area of exclusive jurisdiction of other states: and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.”

69 Very clearly addressed e.g. in the speech by *Chaquez Chirac* to the German Bundestag, 27 June 2000 (*Le Monde*, 28 June 2000, p. 16) stressing that neither the French nor the Germans envisage the creation of a European Super State “qui se substituerait à nos Etats-nation et marquerait la fin de leur existence comme *acteurs de la vie internationale*”.

70 *Giegerich* (2003) pp. 730.

71 Again: this point should not be confounded with the *internal structure* of the EU (see already above in the text near fn 37. Even if we could agree (for the sake of argument) that the Constitution for Europe is shifting the power to the peoples of Europe -- this is the argument put forward by *Albi/Van Elsuwege* (2004) p. 755 et seqq. --, would that mean that external sovereignty lies with the peoples of Europe or with the EU? It is submitted that the only consequence could be the second solution. But this would again mean that the EU would have taken over the statal functions from the member states.

72 In the same vein *Leben* (2000) esp 110 et seq.

a component of a larger community replacing in general involves the issue of “international presence”, international responsibility, and protection by international law. Coined in an abbreviation, sovereignty continues to be the decisive aspect of an entity forming a full member of the international community or not.⁷³ This remains so irrespective of the multitude of obligations which arguably transformed EU Member States to sovereign States with restricted competences.

Having said this it shall nevertheless be pointed to the fact that at least the ability to enter into international obligations -- and thus an important aspect of the mentioned bundle of rights which are ascribed to sovereign States -- is subject to increasing erosion within the EU. This might to a certain extent add to the decreasing significance of the whole concept of sovereignty for EU members. But again this appears not to be a sufficient reason to discard the concept of sovereignty as a whole; most of the other features included in the bundle of sovereign rights according to international law would continue to operate.⁷⁴

Instead of theoretical deliberations suffice it to give an example. The founding instrument of the WTO stipulates that where the European communities exercise their right to vote, “they shall have a number of votes equal to the number of their member States which are Members of the WTO”.⁷⁵ This means that at WTO level international representation at least in the field of exclusive EC competence is being done by EC organs, and not by the Member States. In the field of exclusive competence it would, under the condition that the WTO agreement allows for voting by the EC, be illegal if the Member States would act instead. Consequently, the ability to act internationally was transferred to the EC or the EU respectively. The Member States, by making use of their sovereign right to conclude international treaties (the EC Treaty), deliberately and severely restricted their right to continue with international treaty making. In this context the revamping of the Common Commercial Policy within the Constitution for Europe,⁷⁶ with the establishment of the far-reaching exclusive competence not only to conclude agreements on goods, but also on services, intellectual property rights, and direct investment is of a specific significance. Since it would cover nearly the entire scope of the present WTO activities, it might even be imaginable to terminate WTO membership of the EU Member States and let the EU act alone.⁷⁷ In this case, from the angle of other WTO members it might appear as if the EU would act like a single state, and not on behalf of its Member States. Moreover, other WTO members could be interested in the with-

73 To the same end *Oeter* (2002) 285.

74 This is also not changed by the fact that during the last decades international organisations, private persons, and NGOs increasingly acquire the status of subjects of international law. This development may affect the overall importance of state sovereignty, but does not render it superfluous or without function.

75 Article IX para. 1, Agreement establishing the World Trade Organization. Footnote no 2 specifies that the number of votes of the European Communities and their member States shall in no case exceed the number of member States of the European Communities.

76 Article III-315 TCE. Compare below in the text near fn 100.

77 Compare *Griller* (2004) at p. 86 et seqq.

drawal of EU Member States given that this would reduce their voting power. For it would in such a case not be easy to argue that the EU should still be able to cast a number of votes equal to the number of Member States. Should that happen we might still insist that the EU would represent its member states at WTO level. However, this would come near an artificial interpretation.

Arguably, the new provision in the TCE would not eliminate the *capacity* of the Member States to conclude international agreements under international law, or to act within international organisations. However, such agreements or activities would violate the exclusive competence of the Union, and in this sense sovereignty would appear to be severely restricted. It is true that not all fields of external action would be affected in a similar manner. Especially the Common Foreign and Security Policy (CFSP) is deemed to be a competence category of its own, and not exclusive in nature.⁷⁸ But as a whole the ability of the Member States to act internationally would be drastically reduced. Should one day also the CFSP become an exclusive EU competence this would certainly again provoke the question whether the time has come that EU Member States have lost their status as sovereign States under international law.⁷⁹ As a result of the importance to act in the international arena it might even follow that the other mentioned “benefits” of sovereignty according to international law -- liability, exclusive jurisdiction (vis-a-vis the EU), the prohibition of the use of force (by organs of the EU or other Member States), non-intervention (by the EU or other members) -- could one after another be denied to EU members. Consequently, sovereignty might wither away by continuously transferring external action competencies into the exclusive competence of the EU. However, this is not the actual situation, it is, by contrast, a potential future development, depending not only on the conduct of the EU and its members alone but also on that of the international community.

3. Sovereignty as Political Independence

As demonstrated, the transfer of powers to intergovernmental institutions does in principle not entail the restriction or the loss of national sovereignty defined as “ultimate and independent authority” or as direct subordination to international law. The difficulties arise when it comes to the admissible extent of legal obligations, in the case of the European Union the extent of the transfer of powers and the restrictions placed upon the Member States. On the grounds of the concepts discussed above, this appears to a large extent as a political and constitutional question which

⁷⁸ Compare Article I-12 para. 4 and I-16 TCE.

⁷⁹ Similarly *Oeter* (2002) 277.

is irrelevant for "sovereignty" itself.⁸⁰ This explains why both the limits to the freedom of action and aspects of restricted competence are discussed but declared irrelevant for the *legal notion* of sovereignty. In principle, a State using its competencies to enter into international commitments maintains its legal status as a sovereign State as long as it may terminate the obligation on the basis of international law.⁸¹

The mentioned concerns regarding the irrelevance of such a "formal" concept are reflected by introducing the notion of "political sovereignty". According to *Verdross-Simma* this means the capacity of a State to autonomously execute all essential functions of a State.⁸² It is this understanding which corresponds to the observation that the "term 'sovereignty' may be used as a synonym for independence, an important element in statehood ..."⁸³ And obviously, independence in this sense has vanished for members of the EU given that Community law affects or even harmonises most fields of national legislation.⁸⁴

The indisputable merits of such an approach are addressing the gradual differentiations of international obligations, which in the case of EU membership come near the integration into a new State, measured by the quantity and the quality -- law which is in principle directly applicable and takes precedence over conflicting national law -- of supranational legislation. Nevertheless, it is easy to realise the lack of selectivity of the concept of political sovereignty. It leads to the compilation of a

80 This is different for those who speak of international sovereignty "in its proper sense" only if the State disposes of the substantial part of political decision-making power. See e.g. *Bindschedler* (1968) 174, *Verdross-Simma* (1984) § 38. This view introduces the problem of political sovereignty into the legal notion of sovereignty without, however, indicating how to measure or assess it. As a result only far reaching commitments will provoke a loss of sovereignty. Compare also *Jellinek* (1882) 20, referring to States having mutually agreed to renounce their right to war and peace, to exercise their diplomatic rights and to conclude international treaties: from a political point of view these States which by contract have renounced the above-mentioned powers will not fulfil the qualifications of sovereign States anymore, but politics and jurisprudence, *Jellinek* argues, are different matters.

81 Certain objections in *Dahm* (1958) 155 et seq, 168 et seq.

82 *Verdross-Simma* (1984) § 36. Furthermore *Bindschedler* (1984) 69 et seqq, *Koppensteiner* (1963) 48 et seqq. One may assume that *Bleckmann* (1980) 36 referred to the same notion of sovereignty, by explaining that the comprehensive powers of States constitute an expression of the principle of external sovereignty.

For an early discussion regarding the EC see e.g. *Ophüls* (1965) 520 et seqq, *Bleckmann* (1980) 33 et seqq. Even if not explicitly stated, sovereignty was always on the agenda. As an example see *Bleckmann* (1980) 51 et seq who insists on the restricted nature of sovereignty of EC Member States, whereas *Stern* (1984) 522 argues that on the one hand the transfer of powers does not affect the substance of State sovereignty, and on the other hand, in one of the subsequent phrases, admits the existence of a most limited loss of sovereignty and a certain modification of the notion of sovereignty.

83 *Brownlie* (2003) 75.

84 Compare only *Hartley* (1999) 123 et seqq., *Peters* (2001) 125 et seqq., *Giegerich* (2003), esp. 488 et seqq. *MacCormick* (1999) 132 states that regarding sovereignty "whether as a legal or as a political concept, it is clear that absolute or unitary sovereignty is entirely absent from the legal and political setting of the European Community."

list containing the most typical functions of a State, and implies the necessity to draw a dividing line to identify restrictions or even loss of sovereignty. Such a list will be most imprecise given the diverging examples of statal power and international restrictions during history. Moreover, drawing up such a list means the attempt to confer to all substantial competencies of which the State disposes within the boundaries of its territory the status of subjective rights. This is a futile attempt, for as a matter of principle the State does have every competence to regulate human behaviour within its territory. The attempt amounts to exhaustively describe the possible content of a national order.⁸⁵ It is even less promising to arbitrarily draw a line between “sovereign rights” which may be restricted without affecting sovereignty and those which do.⁸⁶ Against this background and given the lack of justified and equally operational boundaries there is a strong argument to assume that each international treaty restricts sovereignty.⁸⁷ This would lead us to a kind of comparative concept of sovereignty which provides for the establishment of a “scale of state autonomy”, while being unsuitable for deducing legal conclusions. From the point of view of public international law the concept is more or less irrelevant⁸⁸ on the grounds of the criterion of direct subordination to international law. Again it is obvious that it is hard to determine at what point the gradual subordination under the authority of another State or an international organisation produces the qualitative leap of abandoning sovereignty.⁸⁹ However, it might be conceded that political sovereignty and sovereignty as direct subordination to international law might converge regarding the categorical border line not only of the integration into a new state but also of transferring the capacity of external action more or less entirely to another state or an international organisation.

85 *Kelsen* (1925) 110, in the German original: “Ersteres ist der Versuch, alle materiellen Kompetenzen, die der Staat innerhalb des ihm durch das Völkerrecht garantierten territorialen Bereiches hat, als subjektive Rechte darzustellen. Dieser Versuch ist aussichtslos, da dem Staat innerhalb dieses Bereiches grundsätzlich jede die Ordnung menschlichen Verhaltens betreffende Kompetenz zusteht. Er läuft darauf hinaus den möglichen Inhalt der einzelstaatlichen Ordnung erschöpfend zu beschreiben.” See also *Jellinek* (1914) 484, *Koppensteiner* (1963) 43 et seqq.

86 E.g. *Häberle* (1967) 259 (275 et seqq).

87 This conclusion is also the basis of the famous decision of the Permanent Court of International Justice in the *Wimbledon* case (see above in the text before fn 63). From the vast literature compare only *Kelsen* (1925) 112 et seq, *Kunz* (1929) 59, *Öhlinger* (1973) 5, *Morscher* (1978) 79.

88 If one introduces a comparative notion of sovereignty into the concept of sovereignty under public international law, it would be necessary in the light of the respective national Constitution to decide which powers are essential and which are not. In other words it would be important to determine at what stage States start losing their essential amount of decision-making powers.

89 Compare *Brownlie* (2003) p. 76: "... it would be possible for a tribunal to hold that the State which had granted away piecemeal a high proportion of its legal powers had ceased to have a separate existence as a consequence. Obviously it may in law and fact be difficult to distinguish granting away of capacities and the existence of agency or representation."

In the realm of constitutional law such a comparative concept may be used to illustrate the more or less far-reaching dismantling of political sovereignty. However, this is exactly where the crucial problems of legal practice and doctrine arise again: it has to be clarified to what extent the dismantling of political sovereignty is politically reasonable and constitutionally admissible. In return, prohibiting certain international commitments by constitutional law or setting up specific constitutional requirements like qualified majorities for the ratification of certain international agreements may be described as a specific concept of political sovereignty. But this is not much more than etiquette. From a legal point of view it does not add anything substantial to the discussion, particularly with regard to the question of admissibility of such steps, and with regard to its consequences under international law.

The multitude of provisions with respect and limitations to EU membership within the constitutions of the Member States⁹⁰ illustrate the variety of options. The differences in the constitutional bases and restrictions may serve as a proof that there is no uniform conception of political sovereignty. Moreover, it may be argued that taking these constitutional provisions as the substance of the concept of sovereignty as such might be misleading in so far as none of the respective clauses appears to authorise abandoning international legal personality for the sake of EU membership. For example, both the German Constitutional Court and the Danish High Court in their mentioned decisions were eager to make sure that European law does not require making an end to national statehood. This is certainly a core aspect of every sovereignty debate, but it is no sufficient explanation for the additional (and to a certain extent differing) limitations developed in these judgements and the constitutional provisions they are based on. Therefore, the issue of disposing of the bundle of “sovereign rights” which are attributed to States under international law, and hence the core aspect of the sovereignty debate, is not comprehensively addressed by these constitutional clauses and the respective judgements.

In this sense, the concept of political sovereignty is at least partially misleading, above all for rendering the characterisation of an international treaty as affecting sovereignty into a pleonasm. In conclusion it should be clarified: As long as a State does not abandon its statehood by integrating itself into a new State (or an international organisation replacing its legal personality under international law), it is solely a political decision, subject to possible limitations by constitutional law, whether and to what extent it wants to accept international legislation including lawmaking by the European Union. For sure, such a concept of sovereignty is inapt to capture the multi-faceted effects of European integration. However, it might be that this is not the function of sovereignty.

90 Compare above chapter II.

4. Divided Sovereignty

It is contended in literature that the traditional concepts of sovereignty are more or less inadequate to capture the development within the European Union. Instead it is proposed to talk about divided sovereignty.⁹¹

If divided sovereignty is conceptualised as a division of ultimate powers within different fields of competences,⁹² the concept is, applied to the European Union, problematic at the outset. Especially in the field of shared competencies the Union is empowered to legislate in the same fields as the Member States, and to supersede their rules. Neither is there a neat division of competences in the fields of exclusive, supporting, coordinating or supplementing competencies, or in the fields of common foreign and security policy or the coordination of economic and employment policies.

Thus it appears to be more convincing to look at the Union powers as “a complementary constitutional body”.⁹³ Reading this in the sense of a dualist reconstruction of the relation between national law and European law does not seem to lead far. It would simply mean to qualify the national legal orders and the law of the Union as distinct legal orders, yet to a large extent referring to each other. Consequently there would currently be 26 “sovereign” legal orders. Regarding the consequences of the Constitution for the 25 Member States, we would arguably end up with the same questions as above, that is the difficulties of determining those situations where the Member States would lose their quality as full members of the international community.

Another, a probably more promising reading could be that competencies (this might be originally competencies of the Member States) are used in a coordinated manner jointly by the Union and the Member States. This would come very near the discussion on sovereignty in federal States.⁹⁴

Within the concept of political sovereignty, such an approach can be helpful in specifying the restrictions a member state of the European Union has to accept. Certain competences can no longer be used by the Member States alone, but only under the limits imposed by European Union law which to a considerable extent includes the transfer of legislative powers to the European level. However, a first objection is that the division of power or labour within a polity (including a federal state) is different from the power of the State as a whole. Moreover, the transfer of powers does not mean that the European Union itself would acquire the status of a

91 E.g. *Louis* (1990) 11 et seq, *MacCormick* (1999) 129 et seqq, *Oeter* (1995) 667 et seqq, 685 et seqq, *Peters* (2001) 144 et seqq.

92 E.g. *MacCormick* (1999) 130.

93 *Pernice* (1999) 707.

94 *Oeter* (1995) 667 et seqq, 685 et seqq, *Peters* (2001) 144 et seqq, *Wiederin* (1995).

However, it would be hardly defensible to argue that the relations between the Union and the Member States were governed by State law, as is generally the case in federal States. Consequently, the reference to the law of federal States could only be a theoretical one.

sovereign entity. For arguably, the European Union is not (only) directly subordinated to international law, but also to the will of the Member States as the masters of the treaties. Even if the Member States have to observe -- also with regard to desired amendments -- the provisions of these treaties, it can still be said that the European Union in its existence is dependent on the founding treaties and consequently on the will of its Member States. Neither does divided competence in this sense mean that the Member States would lose their legal personality under international law.⁹⁵ Of course, their competences are, as mentioned, severely restricted under the Constitution, but they would still be able to act at the international stage. In this sense, the “bundle of rights” as a “sovereign” member of the international community, and hence: the unifying aspect of the concept remains of relevance.⁹⁶

As a consequence, the concept of divided sovereignty might illustrate how far the similarities between the European Union and a federal state have come. But it might still give no clue to solve the disputed question at what point of time the Member States of the European Union would actually lose their quality as States under international law, and at what point of time the European Union would acquire this status. Arguably, also the entering into force of the new Constitution would not be that point of time, as shall be explained shortly.

IV. *The Constitution for Europe*

The starting point of this short overview shall be the division of competencies between the Member States and the Union. Even today the regulatory powers of the Union and the Communities do not lag far behind those of the central authorities in a loosely integrated federal state.⁹⁷ The EU clearly has a “state-like” appearance in terms of permanent population, defined territory and -- most important here -- scope of powers. It is relatively undisputed that Community competencies nowadays impinge on nearly every field of national law-making.⁹⁸ It is (only) the exact degree of this intrusion into the core of national sovereignty (in the sense of political independence) that is difficult to estimate.

In this respect, the Treaty establishing the Constitution for Europe offers ambivalent strands.⁹⁹ On the one hand, it continues with the transfer of powers to the

95 Both aspects are stressed e.g. in *Giegerich* (2003) 731 et seqq.

96 See also *de Witte* (1998) at p. 303: “If sovereignty is divided, it loses its distinguishing trait.”

97 Compare for the following already *Griller et al* (2000) 70 et seqq.

98 E.g. *Schmitter* (1996) 124: “[t]here is no issue area that was the exclusive domain of national policy in 1950 and that has not somehow and in some degree been incorporated within the authoritative purview of the EC/EU.” As a consequence, it is acceptable - at least in the domain of political science - to address the EU and the EC as “a state-like politico-administrative system” [*Wessels* (1996) 20] which may be described using seemingly competing models of intergovernmental as well as (cooperative) federal structures.

99 See also *Albi/Van Elsuwege* (2004), pp. 747.

European Union. Specifically remarkable in this respect are the new provisions regarding the area of freedom, security and justice including not only the current powers from today's pillar I and III but including new ones.¹⁰⁰ Another example which can hardly be overestimated is the reform of the Common Commercial Policy. The Constitution expands its scope to the conclusion of agreements relating to services, the commercial aspects of intellectual property and foreign direct investment.¹⁰¹ Contrasting to the present situation under the Nice Treaty, this is an *exclusive* competence in its entirety. Among others, nearly the whole range of WTO-subjects would come under the new *exclusive* competence.¹⁰² As a consequence, the Member States lose their right to conclude international agreements in these fields. Their ability to act in international fora is thereby considerably diminished.

Taken altogether, deliberate conferral by the Member States is being continued. Moreover, the far reaching general clauses granting political discretion in expanding the scope of Union law by secondary legislation did not disappear, but were only marginally adjusted. In order *to achieve the establishment and functioning of the internal market*, European laws may still "establish measures for the approximation" of Member States' legislation.¹⁰³ The newly so-called Flexibility clause¹⁰⁴ still provides for the "*necessary*" action in cases where the Constitution has not provided the "necessary powers" -- under the new but insignificant condition that the action has to be "within the framework of the policies defined in Part III". In sum it might be concluded that under the Constitutional Treaty the tendency of the past would be continued and deepened, and that a major part of the applicable law in the Member States would be Union law or national law determined by Union law.

The clearer categorisation of the competencies¹⁰⁵ in exclusive, shared, and supporting, coordinating and supplementing competencies -- while leaving the categories open with regard to common foreign and security policy and the coordination of economic and employment policies -- does not reduce the far reaching scope of powers as transferred by the Constitution.

Furthermore, the Constitution for the first time includes an explicit primacy clause for the law adopted by the institutions of the union, thereby coining the respective jurisprudence of the ECJ.¹⁰⁶ Thus, conflicting Member States' law will be superseded by directly applicable Union law. In substance, this is a continuation of the current situation. However, it has to be noted that eliminating the so called pillar structure would mean that treaty provisions and legislation which today would come

100 Part III, Title III, Chapter IV of the Constitution.

101 Article III-315 of the Constitution.

102 This might be different only regarding international agreements in the field of transport. Arguably, Article III-315 para 5 of the Constitution would create a shared competence in this field.

Thus, there would still be the option to conclude (WTO-) agreements in this field as mixed agreements.

103 Article III-172 of the Constitution. Compare today Article 94 TEC.

104 Article I-18 of the Constitution. Compare today Article 308 TEC.

105 Article I-12 of the Constitution.

106 Article I-6 of the Constitution.

under pillar III, but even European decisions which today would have to be adopted in the legal forms of pillar II could in principle have direct effect and consequently supersede conflicting national law. The same could be true for International Agreements in the field of CFSP.

On the other hand, the Constitution stresses the persistent importance of the Member States and their competencies. The respect of the Union not only for the equality of the Member States but also for their national identities is expressly stipulated.¹⁰⁷ The Constitution protects their “fundamental structures, political and constitutional, inclusive of regional and local self-government”, and calls upon the Union to respect “their essential State functions, including ensuring the territorial integrity of the State ...”. Also, revamping the competencies certainly not only aims at clarification but includes markedly conservatory elements designed to preserve the statal character of the Member States.¹⁰⁸ This happens by upholding the so-called principles of conferral, subsidiarity and proportionality. Furthermore, the backside of the coin is expressly spelled out as well: “Competences not conferred upon the Union in the Constitution remain with the Member States.”¹⁰⁹ Already at this point it is clear that the conferral of competencies by the Member States is a condition for a corresponding power of the Union meaning that it is not entirely in the Union’s discretion to determine its own competencies (Kompetenz-Kompetenz).

Another important feature is the provisions relating to the legal foundation of the Union including amendment procedures. First, we are dealing with a Constitution for Europe being established by a *treaty* concluded by the Member States and open to all “European States”.¹¹⁰ It is true that the establishment of the Union is said to not only reflect the will of the States of Europe but also the will of the citizens of Europe.¹¹¹ However, as far as the conclusion and the possible termination of the Constitution are concerned, the citizens obviously are represented by their States. Express provision foresees that the Treaty has to be ratified by the High Contracting Parties in accordance with their respective constitutional requirements.¹¹² Thereby the amendment requirements laid down in Article 48 TEU shall be met.

Second, the Constitution differentiates between ordinary and simplified revision procedures. Ordinary revisions¹¹³ can be initiated by any Member State, the European Parliament or the Commission. The European Council consequently convenes a Convention similar to the one which drafted the new Constitution, composed of representatives of the national Parliaments, of the Heads of State or Government of

107 Article I-5 of the Constitution.

108 In parts, this is a continuation of similar efforts starting with the Maastricht Treaty at the latest; compare E.g. *Dashwood* (1998).

109 Article I-11 of the Constitution.

110 Article I-1 of the Constitution.

111 Article I-1 of the Constitution; compare also the preamble (last recital) saying that the members of the European Convention prepared the draft of the Constitution "on behalf of the citizens and the States of Europe".

112 Article IV-447 of the Constitution.

113 Article IV-443 of the Constitution.

the Member States, of the European Parliament and of the Commission. The Convention can adopt by consensus a recommendation for amendments to an intergovernmental conference. Only minor changes can be submitted -- by skipping the Convention procedure -- directly to such a conference by the European Council and with the consent of the European Parliament. Changes accorded by the intergovernmental conference enter into force only after being ratified by all Member States in accordance with their respective constitutional requirements. Simplified revisions are twofold. The first alternative¹¹⁴ concerns the so-called *Passerelle*: it authorizes the Council to introduce qualified majority voting or the ordinary legislative procedure in those cases where Part III of the current text stipulates unanimity or a special legislative procedure. The second alternative¹¹⁵ concerns internal Union policies and action. It allows for revising all or part of the provisions on internal policies and action -- internal market, economic and monetary policy, policies in other areas (e.g. social policy, agriculture, or environment), area of freedom, security and justice, areas of supporting, coordinating or complementary action (e.g. public health, industry, culture, tourism) -- by unanimous European decision to be taken by the European Council. However, such a decision needs the approval by the Member States in accordance with their respective constitutional requirements, and it must not increase the competencies of the Union. Thus, also the simplified procedure foresees the cooperation of institutions of the Union and of the Member States as a prerequisite of alterations.

Of central importance with regard to the subject of sovereignty is the new clause providing for voluntary withdrawal from the Union, basically simply by notification and the subsequent lapse of a two years period.¹¹⁶

Taken altogether these alterations would not produce a qualitative leap compared to the situation as it stands today. It goes without saying that there would still be no clear cut limitation for the competencies of the EU, and no corresponding guarantee of national sovereignty for the Member States. The Constitution of Europe would continue with the development of the last decades, namely the transfer of competencies to the European level which results in a massive restriction of the Member States' ability to take policy decisions on their own; this capacity would be continued to be shifted gradually to the EU. In a counterbalancing effort, however, the Constitution is eager to avoid the impression that the Member States' status is substantially diminished, by stressing the respect for their identities including the essential State functions. The fragile balance between preserving the statal quality of the Member States and strengthening the capacity of the EU would continue to exist. Consequently, the unified EU would still remain in the undecided state of suspense, in a material sense, between a confederation and a federation. The formal status of

114 Article IV-444 of the Constitution.

115 Article IV-445 of the Constitution.

116 Article I-60 of the Constitution.

sovereignty would not be wiped out on the side of the Member States, and it would not be transferred to the EU.

This would be different if the Constitution for Europe would change the legal quality of the relation between the Union and the Member States. And indeed, it is argued that codifying the principle of supremacy in the Constitution -- “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.”¹¹⁷ -- would produce such a qualitative change.¹¹⁸ By accepting the constitutional Treaty, the Member States would accept primacy of EU law over the *entire* corpus of national law. Reservations with respect to the core of national constitutional law, like in the Maastricht-judgement of the German Constitutional Court, would no longer be possible, such national reservations could no longer be upheld on the grounds of the new Treaty. The guarantee for the national identity of the Member States¹¹⁹ would only exist at EU level. Its observation would be exclusively a question of Union law making the ECJ the last arbiter in the matter.

However, it is not easy to see how such far-reaching consequences could be inferred from the codification of the supremacy principle, given that the limitation resulting from the clause “in exercising competences conferred on it”, and the guarantees for the national identity would as well be made explicit, and could be the anchor for the Member States’ courts to limit any encroachments on national “sovereignty”. Also future amendments to the Constitution would be subject to national ratification and judicial control regarding their constitutionality. Of course, the threat of an open conflict between the ECJ and national courts insisting on their power to preserve national sovereignty would not be eliminated by the new text. But also this would be no qualitative change. The “co-operation” between the ECJ and national courts in the enforcement of the respective constitutions would continue.

V. Conclusion

The Constitution for Europe as agreed by the intergovernmental conference in autumn 2004 does not affect national sovereignty, as long as sovereignty is understood in the formal sense as supreme and independent authority, or as direct subordination of a State to international law. It has to be added, however, that the members of the EU might be considered to be States with restricted competencies, without an immediate consequence regarding their capacity as members of the international community. It can also be added that in the long run sovereignty in this sense might become an empty concept, corresponding to the increasing transfer of treaty making power to the Union, which could be acknowledged by the international

117 Article I-6 of the Constitution.

118 *Öhlinger* (2005) at p. 691 et seq.

119 Article I-5 paragraph 1 of the Constitution.

community as more and more replacing the Members States in the international sphere.

By contrast, if we speak about political sovereignty, there is no doubt that sovereignty is already affected today, and that the Constitution for Europe further add to that development. To determine the exact consequences, however, requires an analysis of the whole of the treaty obligations in detail. This is so since by definition political sovereignty is affected by each international obligation. In this respect, there is no *categorical* difference between the status quo and the Constitution for Europe.

The concept of divided sovereignty is helpful in illustrating the degree of similarity between federal States and the European Union, coming from the arsenal of explanatory instruments developed in the theory of federal States. However, also this approach does not bring the difficult issue of the possible termination of the legal personality of the Member States under international law, nor the possible creation of the European Union as a new fully fledged subject of international law closer to a solution.

Things would be different if the new Constitution would create a European State replacing the Member States as subjects of international law. In this case, there would be a new sovereign entity: the European Union, while the Member States would more or less disappear from the international stage. The Constitution does not introduce such a development. This is not to say that it would entirely exclude it. It might be possible that, on the grounds of this Constitution, the Member States would decide to found such a new European State. Today, such a founding will is not visible, and its emergence in the near future does not appear to be likely.