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LESSONS FROM THE “CONSTITUTIONAL MYTHOLOGY” OR HOW TO RECONCILE THE CONCEPT OF STATE SOVEREIGNTY WITH EUROPEAN INTAGRATION

Ondrej Hamuľák¹

Abstract

This paper analyses the question of how to perceive the traditional theoretical concept of state sovereignty vis-à-vis European integration. Within the European project we face the paradox of having two authorities claiming autonomy and dominance. It is undisputable that the European Union is behaving like an autonomous public power – the new sovereign of its kind. But at the same time the Member States also maintain their sovereign statehood. This duality cannot be comprehended together with the old characteristics of sovereignty, which accepts only one holder of this feature. To reconcile the phenomena of European integration and the concept of sovereignty, we must shift into new definitions of the latter. This paper argues in favour of the acceptance of a shared sovereignty concept.

Keywords

Sovereignty, European Integration, Westphalian Sovereignty, Shared Sovereignty

I. Introduction

The very foundation of European integration, the supranational method based on the transfer of competences from the national to the European level, is essentially programmed to limit the powers of Member States. The EU ceased to be just a forum for negotiations between independent and sovereign nation states. It overlaps with the states and becomes their competitor. The process of European integration leads to a rivalry between power centres (Bárány, 2007) and to a certain degree of multi-level governance. It is a fact that the European Union is a new normative centre which creates its own independent legal system. This law, through its normative effects and application, in everyday practice violates the

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autonomy of national law. Thus the traditional state's monopoly on legal violence on its own territory is no longer present.

However, despite the pressure of integration, the EU does not replace or absorb its Member States. States are still the key founding blocks of integration, with a crucial position within the processes of constitutional transformations of the EU. European integration then brings us to a Janus-faced dilemma. Apart from understanding states as building blocks of the EU, we must keep in mind the perpetual process of the autonomous constitutionalisation of the European Union and the fields where it enjoys independence (own institutions, own legal system, own budgetary power, independent judicial power, autonomous and dominant legal norms, etc.). The current integration is correlated with a certain degree of constitutional tensions and debates about defining the roles of the Member States, and the role of the EU, within it. One topical question is how the integration and normative ambitions of the EU touch upon the concept of state sovereignty. Is the EU a quasi-federation with the sovereignty held by the centre? Or is it just a product, with sovereignty still, only and forever in the hands of Member States? Or did sovereignty disappear once the Member States opted for supranationality as the basic method of their cooperation?²

The world without sovereignty?

The last option leads us to the world of legal heterarchy and postmodern pluralism, to a world without sovereignty ('beyond sovereignty, post sovereignty'), where neither state nor supranational organization is master. MacCormick (1999) presents this view as an alternative to the classical "re-creative" concept of sovereignty, according to which loss of the sovereignty at one level inevitably leads to its recreation at another. Contrary to this old perception, he argues that we should understand sovereignty as a category, which disappears without compensation once a state participates in an integration project. In this view, states are no longer sovereign, but they also are not subordinate to any other sovereign entity. He compares state sovereignty to virginity, which cannot be renewed after it is lost, but also no one else acquires it. Then he rejects both 'mega-sovereignty' of the EU and tens of 'polycentric' state sovereignties across Europe. MacCormick (1993) also welcomes a world beyond sovereignty mainly because of the past bloody consequences of the classical "sovereignty games" between states. He claims that: "One of the main upshots of universal sovereign statehood was two disasters – world wars" and continues by asking whether: "we [can] think of a world in which our normative existence and our practical life are anchored in, or related to, a variety of institutional systems, each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which, for most purposes, can operate without serious mutual conflict in areas of overlap? If this is as possible practically as it clearly is conceptually, it would involve diffusion of political power centres as well as of legal authorities. It would depend on a high degree of relatively willing co-operation and a relatively low degree of coercion in its direct and naked forms. It would create space for a real and serious debate about the demands of subsidiarity." Even though this optimistic view is very attractive

² Weatherill (2010) asks a similar question: "Was this State-building? State-replacing?"

and encompasses a deep message of humanity (or rather belief in humankind), it is hardly acceptable in the real world. A positive response to this question anticipates that we accept a common core of both the supranational and domestic legal systems. Shared values (Kumm, 2005), common language, or approach to legal interpretation (Maduro, 2003) could lead to the reception of a (post) sovereignty condition. But this theory seems, however, rather like a laboratory solution with minor significance in real life, as it places such great demand on both theory and practice.

Sovereignty still matters, but it is not the same

It seems more suitable to describe the current state of affairs by using the term ‘late sovereignty’ (Walker, 2002) rather than ‘beyond sovereignty’. The abovementioned perspective and call to abandon the concept of sovereignty faces another specific difficulty, particularly in connection with the Czech Republic and other countries of the former eastern bloc. Experience with the fact of the Brezhnev doctrine, which represented the actual suppression of autonomy in so-called Soviet satellites, led to the special constitutional accentuation of state sovereignty in these countries. Newly-regained freedom became an important constitutional value (Halász, 2001; Tokár, 2001) and sensitive political question (Aziz, 2004). Therefore it was anticipated that the new Member States and their constitutional authorities would be much more careful and much more sensitive about the loss or weakening of their sovereignty in connection with European integration than their Western counterparts (Sadurski, 2006). Once the Czech Constitution states in Art. 1 para. 1, that “The Czech Republic is a sovereign, unitary and democratic, law-abiding State, based on respect for the rights and freedoms of man and citizen”, it is hard to imagine that, within the European Union, this constitutional feature could disappear! Acceptation of a state of affairs beyond sovereignty would mean an inadmissible negation of the explicit wording of the Constitution. For this reason, we have to accept the concept of state sovereignty as still valid but make an attempt to reconcile it with the ambitions of the European integration project. Schmitt (1985) reminds us that, among all concepts of legal and political theory, sovereignty is one that depends mostly on current and particular interests. Czech constitutionalist and Judge of the Constitutional Court, Filip (2009), adds that no interpretation of sovereignty can ever satisfy everyone. Looking for an answer to the dilemma of how to grasp the concept of sovereignty within European integration seems to be a never-ending story. But one need not be so sceptical. It is the role and duty of scholarship to offer certain answers and solutions. The research objective of this paper is to analyse what implications for its national sovereignty arise from the membership of the Czech Republic in the EU. The outcome should be the harmonization of Czech statehood (and the constitutional requirement articulated in Art. 1 para. 1 of the Constitution) with participation in the European integration project. We have to look for paths of theoretical reconciliation and new definitions. European integration calls for new concepts and the modern shaping of the contours of the state sovereignty both in the field of constitutional theory as well as in the field of political science. There are obviously some critical voices that reject new definitions. For example, Kurtulus (2005) is very critical of what he calls the biased bending of time-proven concepts and thus rejects all new perception of sovereignty (both

shared and pooled sovereignty). Attempts to redefine sovereignty in his view resemble the occult practices of fortune-tellers more than serious scholarly work. I must reject that criticism. MacCormick (1999) wrote that, to understand a new legal reality which results from the development of supranational entities, a certain amount of imagination is needed. The picture which is appearing in front of our eyes is an image of the European Union as a complex constitutional system. The concept of complexity in connection with the supranational system reflects both its meanings. It is a comprehensive, internally structured, system, as well as a system exhibiting a certain degree of difficulty that complicates its understanding. It might be determined as the “constitutional mosaic” (Walker, Shaw, Tierney, 2011). And, yes, in looking for the new definitions, we have to walk a path of uncertain, even mythological character. It is no surprise that great revolutions in EU law (the establishment of principles of direct effect and primacy) were connected with the emergence of ‘mythical’ terminology. In the early days of integration, transcendent terms like ‘founding fathers’ and ‘spirit of Treaties’ were introduced as important arguments in favour of supranational constitutionalisation (Cruz, 2011). And it is worth saying that the outcomes based on those “not scholarly” arguments were widely accepted at the time of their creation (Stein, 1981) and over decades of practice.

II. Heterarchy of Sovereigns and Shared Entitlement to Legitimate Violence in the EU

First of all we must admit that there is no specific original *pouvoir constituant* behind the processes of European integration. The EU does not have its own demos to serve as the source of constitutional power. There has been no constitutional revolution and the Member States were not united in some federal union by a single constitutional text. Member States are always present as building blocks of the EU and, despite the pressures of integration, they have not been swallowed by it. As the German Federal Constitutional Court clearly emphasized in its important Lisbon judgement³, the ‘state is not a myth’ but is a fundamental form of the organization of the western society. The Member States are the original holders of competences and remain independent units. Their right to withdraw from the Union, confirmed by the Treaty of Lisbon (see Art. 50 TEU) underlines this fact. Member States must be understood as the “holders of their own destiny”, the masters in case analogical to the Schmittian extreme situation. Schmitt (1985) commences his Political Theology by the famous sentence ‘sovereign is he who decides on the exception’. According to Schmitt the exception ‘can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like’. Even though in case of withdrawal we are not dealing with the danger to the sole existence of the state, the question whether to be or not to be a Member State is extreme enough for the transmission of this concept into the reflexions on the role of state within the European integration.

³ Lisbon judgement of Federal constitutional court of 30 June, 2009, 2 BvE 2/08, Absatz-Nr. 1/421. Available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html. For comments on this judgement, see i.e. Schorkopf (2009).

On the other hand, the EU undoubtedly profiles itself as an independent entity, as some kind of sovereign which independently and individually manages the agenda entrusted to it by a transfer of competences from Member States. The EU is a specific complex organism which disposes of independent decision-making tools and its own power mechanisms. It can autonomously and directly affect the legal status of legal subjects, and that makes it a form of public power, a self-governing subject, and a sovereign of its kind, which co-exists with its basic units. We should mainly perceive EU sovereignty materially. It is obvious that, when talking about the EU's sovereignty (Večeřa, 2001), we must consider the sum of the objectives that it should secure through its competences (Pavlíček, 2011). Sovereignty as an ability to meet specific regulatory functions autonomously can be assigned to a supranational entity. To reject such forms of sovereignty would mean the rejection of the fact that the EU can fulfil external⁴ and internal tasks for which it holds responsibility. According to a former Judge of the German Federal Constitutional Court, Dieter Grimm, nation states no longer possess a monopoly on legal violence. Plenty of matters of high political importance are no longer decided by national institutions, governments and parliaments, but are determined in Brussels.⁵ Partial transfer of the execution of legitimate violence would be hardly imaginable if not conducted by a sovereign entity. The EU as a new sovereign assumes part of the political power traditionally assigned to the states. This phenomenon comes under the theory of global constitutionalism. Příbáň (2013) adds that the power of governance used to be generally related to national sovereignty, but today is transferred to other organizations and structures of a supranational or transnational system of politics and law. Therefore he argues that, in connection with the EU, we may talk not only about divided or shared sovereignty but can even call it multiple sovereignty. The political system and processes of governance within the EU entrust two types of subjects with similar duty – to accomplish the goals of integration (Brinkhorst, 2009). Stein (1999) speaks in this respect about a 'divided power system'. This type of system gives rise to a multilevel structure of 'mutually relatively independent [...] public powers' (Bárány, 1999).

Recognizing the EU's autonomy and accepting its independent constitutional processes while preserving the autonomy of its Member States brings, however, some complications. The system of European integration based on the plurality and separation of the actors creates a breeding ground for tension (MacCormick, 1999) between EU law and national law of its Member States. This tension is based on diverse understandings of the legal basis of the EU legal system, on a distinct approach to grounds of its applicability (Borowski, 2008). The Court of Justice considers EU law autonomous because it arises from its own source, i.e. the Treaties. National (constitutional) courts see the domestic applicability of EU law as being embodied in national constitutions (Maduro, 1998). European Communities originally stood as a *tabula rasa* in terms of some constitutional culture (all

⁴ When executing its external competences, the EU (or, respectively, its predecessor, the Community) has for quite some time been considered an autonomous subject of international law, which creates space for its comparison with a sovereign state (Meunier, McNamara, 2007).

⁵ See the transcript of Marie Bydžovská's interview with Dieter Grimm of 20 September, 2010. *Euroskop.cz*. Retrieved from <https://www.euroskop.cz/8801/17387/clanek/staty-ztratily-monopol-na-legitimni-nasili/>.

the competences, functions and identity of European Communities were transferred from Member States). But as Walker reminds us, we must distinguish between this original state and the later situation when, due to the evolution of integration, elements of an own, autonomous constitutional culture emerged in the Community/Union (Walker, 2006). The relationship between supranational and national law undeniably implies a clash, the solution of which depends on the preferred point of view. Member States obviously favour the traditional perspective, and thus national law is perceived as a foundation which gives rise to international commitments of the state and is therefore paramount to EU norms. The opposite view is based on the argument of the emancipation of the EU law and promulgates the necessity for the effective and unified application of supranational norms. This inevitably requires their priority over national law.

In this binary world of two perspectives, we have to face a dilemma akin to two roosters in a hen house. The described war of legal systems (and their courts) cannot have a final winner, because there is no independent arbitrator with the authority to resolve conflicts between the EU and national law. Under these circumstances, only individual battles have winners and no-one can win the war. The ‘winner’ is the court, which has the privilege to be the last to decide on each concrete case. The emergence of a new case gives the concerned actors an opportunity to argue for or against previous rulings made by the other side. And thus the circle may again be opened. An example of such conflict may be seen in the different approach of the Court of Justice and Czech Constitutional Court to the evaluation of the so-called Slovak Pensions case. In the past, the Czech Constitutional Court repeatedly stood up for the claims of Czech citizens – who were employed by an employer based in the Slovak part of the former federation – to receive compensation payment up to the level of their hypothetical pension, which they would have been entitled to had they worked in the Czech part of the common state. The Court of Justice, in its judgement C-399/09 Landtová⁶, ruled that the aforementioned special compensation was in breach of EU law on free movement and principles of non-discrimination on the basis of nationality. This was because the pensions were being awarded solely to Czech nationals with permanent residence in the Czech Republic. In January 2012, the Constitutional Court gave its verdict in the case of *Slovak pensions XVII*⁷, where it completely refused the view of Court of Justice and proclaimed its ruling in the Landtová case as an ultra vires decision (Zbírál, 2012; Král, 2013). The dispute was finally resolved by the intervention of the executive power and a change in the Czech regulations. Notwithstanding that, the judicial conflict remains and could at least have theoretical consequences (Bobek, 2014). The duality is in fact written in the genetic information of the EU. The EU’s internal institutional structure itself includes this duality. It encompasses institutions which can – in order to ensure the division of power – be seen as rivals of the Member States, namely the EU Commission and the ECJ (the sign of suppression of sovereignty) and it also contains institutions representing the interests of the Member States, namely the Council and European Council (a sign of an appreciation of sovereignty). What is more, plurality

⁶ ECJ judgment of 22 June, 2011, C-399/09 Marie Landtová proti Česká správa sociálního zabezpečení [2011] ECR p. I-5573.

⁷ Constitutional Court ruling of 31 January, 2012, PL. ÚS 5/12 Slovak Pensions XVII.

and heterarchy are even encoded in EU primary law. Art. 4 para. 2, 3 TEU codifies mutual loyalty as well as mutual respect between supranational and national level.⁸ It serves as the underframe for the further development of the effective application of EU law (it is well known that the principle of indirect effect was based on the Member State's commitment of loyalty) but on the other hand it could serve as the ultimate shield of Member States' important constitutional values, including the essence of their sovereignty (Grinc, Ondřejková, 2014). In the absence of a pyramidal structure of a legal system, when there is no established formal hierarchy between the EU and national law, and when every component of the system still wishes to assume primacy, we have to accept the existence of some grey zone between these actors (and their legal systems). Baquero Cruz (2011) describes this grey zone as an 'area of darkness'. This darkness and related lack of enclosure contributes to a reduced comprehensibility of legal regulation and the erosion of law in its traditional understanding as the normative bound of society. The comfort of one legal system as a reflection of one sovereign's will is fading away. The pyramidal structure of the legal system was connected with the faith that an individual would be able to reach the ultimate norm that is associated with an unquestionable legitimacy. Indeed, the acceptance of several co-existing legal systems undermines this certainty. Thus the tradition and automatic (somehow intuitive) acceptance of legal norms is endangered. But it is not necessary to be so pessimistic.

The aforementioned grey zone can also be perceived in a positive way. There is no need to approach the problem in a monistic attitude and argue in favour of any primacy being disrespectful, whether European or national. The grey zone gives us good ground for flexibility and openness. Czech professor of jurisprudence and former Judge of the Constitutional Court, Holländer (2009a), argues against the phenomenon of reductionism in social sciences. He criticises negligent one-sidedness, the tendency to find ultimate solutions, and wants to provoke interest in a plurality of default principles. We have to give it a try even when facing the challenge of integration. Postmodernity brings deconstruction. The nation state as the traditional security of stability is no longer above everything but somewhere in the middle (Bárány, 2007). As Cranston (2004) reminds us: 'Centuries ago, Copernicus taught humanity that the world is not the centre of the universe. Now humanity is learning that the nation-state is not the centre of the world'. The phenomenon of European integration, its federalizing tendencies and dominance of European law, essentially bring up the question of whether the Member States continue to possess their own sovereign status or not. My argument is that obviously they are still sovereigns, but their new sovereignty has to be perceived from a modern perspective and newly redefined.

⁸ Art. 4, para. 2, 3 TEU states that: [...] The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. [...] Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties [...].

III. Two Perspectives on the Meaning of State Sovereignty

When defining the term state sovereignty, we come across a constitutional evergreen – a conflict between doctrines which consider this concept a unitary and practically indivisible ‘artefact’, and theories which believe that sovereignty is divisible and, thus, that we can use its various parts. In other words, conflict over the question of whether state sovereignty is an indivisible quality or a divisible capital.⁹ Bartoň (2010) accurately sees this conflict as a clash between a binary view (yes/no) and viewing sovereignty as a rating scale concept (more/less).

Static perception

The first view is static and *étatic*. It is known as the traditional or ‘Westphalian’ understanding of sovereignty. Sovereignty is defined as an immanent characteristic of a state and no other unit, higher or lower, can become a sovereign but a state. This approach makes the stabilization aspect of sovereignty more than obvious. Sovereignty is an axiomatic category due to its indivisible and non-transferable quality. When a state ceases to exist, its sovereignty also ends. And, contrarily, it emerges when a new state comes into a being. The existence of a plurality of sovereign structures on one territory is in this approach unthinkable. Federal Constitutional Court Judge Udo di Fabio, who represents this understanding of sovereignty, notes that sovereignty is a concept of international law and actually means state independence. In his view, one either is independent or not. It is exactly the same as with freedom. In international law, states cannot hand over sovereignty because then they would no longer be states. He therefore recognizes that visions of divided or shared sovereignty are misleading.¹⁰ Within such a traditional understanding, sovereignty is a category which does not alter its content or structure. It can only change its holder. The transfer of sovereignty to another subject means that the original holder loses it. Sovereignty is absolute; a sovereign is a single entity (new states in the case of dissolution, federation in the case of unification, a current state legally joined by an originally sovereign entity). This perspective works on the assumption that there are winners and losers. Accepting a new (another) sovereign simultaneously means accepting the demise of one’s own original sovereignty. When we apply this perspective to the circumstances of European integration, we can come to two different results. If we accept that the EU is a new sovereign, we would also have to negate sovereign statehood and the further independent existence of the Member States. This view is clearly unacceptable. The EU has not become a super-state which would absorb its Member States. They are still here as (the original) sovereigns. The obligation to ratify every important reform of primary law and general right of supervision over any Treaty revision places the responsibility for the destiny of integration into the hands of these states. As the German Federal Constitutional Court noted in its decision on the Euro Rescue Package¹¹, Germany (and we may transplant

⁹ Or, in other words, ‘Indivisible Quality or a Divisible Property’ (Kurtulus, 2005).

¹⁰ See transcript of the interview with Udo di Fabio from 12 December, 2009. *Euroskop.cz*. Retrieved from <http://www.euroskop.cz/8801/14887/clanek/po-lisabonu-jsme-uz-na-hranici-federace>.

¹¹ See the Federal Constitutional Court’s judgement of 7 September, 2011, Euro-Urteil, 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10.

this to all Member States in general) is not subject to any unpredictable automatism of EU integration, which would follow only its own course irrespective of the Member States, but diversely it is as a Master of the Treaty responsible for such changes. On the other hand, if we were to assert that the states are the only and exclusive possessors of sovereignty, we would then reject the fact that the EU is more than just an international intergovernmental organization, that it is an independent subject with its own constitutional story and own responsibility.

Dynamic approach

The second approach considers sovereignty to be a flexible category (materially and functionally). It allows for some division and transfer of its parts. According to this view, we see acceptance of shared sovereignty and a formation of its pooled form. Sovereignty partially passes away from states and can be assigned (in a partial, limited understanding) to other, e.g. supranational, entities. Walker (2002) notes that we may understand authority and sovereignty in the post-Westphalian order as non-exclusive terms. He adds that loss of exclusivity does not necessarily lead to a loss of autonomy. A new perspective on sovereignty appears mainly in the last decade of the 20th century after the fall of the Iron Curtain and is undoubtedly also connected with the processes of globalization (Agnew, 2009). Sajó (2001) predicted that the first two decades of the new millennium would increasingly demand that nation states give up their national sovereignty. The interdependence of world economies, global environmental and security threats, international terrorism, real power of multinational corporations, the parallel world of cyberspace and many other external factors further intensified the deconstruction of traditional state structures (Ušiak, 2009). Globalization requires a new understanding of the role that states play. Their power is suppressed by public as well as private factors. Václav Havel in some public statements aptly observed that, for example, accepting a foreign military base on a country's territory would not affect a state's sovereignty any more than selling shares of strategic national companies to a foreign shareholder (Šamálík, 2008).

The second alternative reading of sovereignty – the so-called rating scale concept – is an ideal tool for reacting to the challenges of European integration and for opening up the old concept to new situations. Since the end of the Thirty Years' War, we have somehow become accustomed to a Europe where nation states dominated and were unwavering holders of absolute sovereignty. We consider the modern state to be some ontological (or even mythical) being whose existence does not need to be proven (Wind, 2003). We have also become accustomed to the idea that everything arises from a nation state – society, public power, authority, legal regulation, etc. However, we should be reminded that the concept of state sovereignty is not eternal. It was only introduced some four or five hundred years ago. But European history precedes Bodin and the Westphalian system. European history had been defined by the pluralism and heterarchy of two swords (ecclesiastical and secular) as its two power centres for many centuries (Goldman, 2007). And the presence of these two centres had not in any way negated the existence of state structures – medieval kingdoms.

Moreover, sovereignty cannot be understood as a static concept that has not changed its content and definition over the years. Over the centuries, the internal dimension of sovereignty has been weakened by the democratization of societies, by seeking the sources of legitimate power, by enforcing the concept of a material constitutional state (Merriam, 1900). Its external dimension has been modified in connection with deepening international collaboration and integration, with the introduction of international rules for conflict resolution, with the establishment of integration bodies, etc. (Holländer, 2009b). The concept of sovereignty itself is a theoretical construction reacting to some specific political fact. The historical roots of the traditional (Bodinian) understanding of sovereignty can be found in Western Europe in the early modern period, when the concept of sovereignty became a tool of secularization, the sword defending the power of the kings against papal omnipotence and a tool emancipating nation states from the emperor's power (Hobza, 1933). The concept of (monarch's) sovereignty was born from the blood of the St. Bartholomew's Day Massacre (1572) and became the foundation for the organization of governance in a modern state (Beaulac, 2003). The legal construction of absolute and everlasting king's sovereignty was a prerequisite for a state's existence, a requirement for its internal organization and stability. Centralism and absolutism became the foundations of the early modern state and a tool for overcoming power entropy, eliminating so-called states within states and feudal fragmentation (Klokočka, 2006). However, the understanding of sovereignty further developed in the following periods and flexibly reacted to historical changes. The most distinct change related to the holders of sovereignty. We may interconnect the sovereignty holder with the emancipation revolutions – the monarch's emancipation from the Pope and the emperor (16/17th centuries), the people's emancipation from the monarch (18th century), the emancipation of nations/nation states (19th century), and the emancipation of individuals/human rights holders from the state power apparatus (20th century). States (sovereigns) are now increasingly expected to serve their citizens. This responsibility leads to a new understanding of internal sovereignty and concepts of so-called Ethical Sovereignty (Minkkinen, 2007).

Another tendency to adopt an open understanding of sovereignty results from the development of new forms of organization and the managing of social relations in an integrated Europe. Indeed, sovereignty continues to be a constitutional concept indispensable for the constitutional organisation of society (Rabkin, 2007). It anchors the behaviour of specific subjects with authority, legitimacy, responsibility, and accountability. But it needs redefinition when considered in connection with European integration. It is indispensable to reflect the social developments and new phenomena by hermeneutical shifts (Jirásková, 1999). In the specific conditions of European integration, sovereignty cannot handle traditional perspectives. The application of a modern viewpoint allows us to escape a theoretical gridlock known as 'the Brunner Paradox'. This paradox refers to the conflict between the practical acceptance of specific features of European integration on the one hand and the application of old language and static constitutional reasoning on the other, a practice traditionally interconnected with the 'European decisions' of the German Federal Constitutional Court (Everson, 1998).

The traditional Westphalian understanding of sovereignty is sometimes used as an argument against the deepening of European integration. But in real life this abstract sovereignty (unique, highest, independent power) does not obstruct the perpetual development of the European project. All Member States have actually accepted the specific nature of the EU and the new legal situation. The founding Member States did it once they provided the EC/EU with a ‘self-constituting’ programme. And all acceding Member States did it by deliberate acceptance of the up-to-date developed supranational constitutionalism.¹² The institute of state sovereignty had undergone a transformation and gained new proportion. It is no longer solely an attribute of a nation state and an expression of its power over the controlled territory. The current concept of sovereignty is necessarily connected with the state’s willingness and will to participate in venues of international cooperation, and to share its competences with other subjects of the international community. Sovereignty is a ‘manifestation of the new order in a globalized world’¹³ where economies and decision-making processes become interdependent and some responsibility has shifted from the national states to another centres of governance. As a consequence, new approaches to traditional theoretical concepts emerge (Zemánek, 2009). One of them, state sovereignty, acquires a new dimension in connection with European integration, where sharing common goals and more importantly sharing competences gave rise to concepts of shared (Wallace, 1999) or pooled (Williams, 1990) sovereignty. The dividing (and pooling) of sovereignty is a reaction to the formation of a ‘post national global society’ (Příbáň, 2012). Today, a sovereign should be well able to organize the performance of the society, to tolerate the realms of fragmentation, integration and globalization. Sovereignty expresses the state’s capability to secure social needs and protect individuals in a global context. A state is not sovereign because it holds the highest, unique and absolute power over a certain territory and its population. It is sovereign because it preserves a minimal pool of instruments necessary to protect the interests and needs of its population. A state’s sovereignty is not threatened by the transfer of some competences to the EU level and the acceptance of its influence. Contrary to that, it would be threatened if the states lost their ability to serve the good of their society and its components. The concept of the sharing of competences between Member States and the EU based on voluntary participation represents a foundation for deviation from the traditional closed understanding of state sovereignty. EU membership and the concept of shared/pooled sovereignty also carry many advantages for the Member States. The Czech Constitutional Court reminds us that Member States should accept a sum of obligations and respect established formal processes because they (voluntarily) participate in the construction of the European supranational entity and make use of its advantages. It specifically states that: ‘[. . .] in a modern democratic state governed by the rule of law, the sovereignty of the state is not an aim in and of itself, that is, in isolation, but is a means for fulfilling the fundamental values on which the construction of a democratic state governed by the rule of law stands. [. . .]’

¹² The first enlargement in 1973 came almost exactly ten years after the famous verdicts 26/62 Van Gend en Loos and 6/64 Costa. Příbáň (2006) argues (in particularly on behalf of countries from Central and Eastern Europe) that new Member States had sold out their newly acquired sovereignty in exchange for their return to Europe.

¹³ Point 102 Constitutional Court’s ruling of 26 November, 2008, sp. zn. Pl. ÚS 19/08 Lisbon Treaty I.

the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign's participation in a manner that is agreed upon in advance and is subject to review, is not a conceptual weakening of sovereignty, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole'.¹⁴ States do not lose their sovereignty by pooling it. They only shift the responsibility for political decisions to a supranational authority and to some extent trade the capability to produce individual solutions for the advantage of higher effectiveness within the bounds of a common project (Lake, 2007). Forsyth (1995) discusses how the Member States formed a new sovereign entity, with which they share a common territory on which it executes its power. The relationship between the EU and its Member States is not connected by a splitting of sovereignty but by the overlapping sovereign competences of both. A flexible perception of sovereignty in the ideal world of concepts allows Member States to preserve their sovereignty vis-à-vis European integration. Committing some of their original competences to the supranational institutions does not lead to a loss or depreciation of sovereignty. On the contrary, the collective management of issues of common interest strengthens it.

IV. Conclusion

The EU is a supranational organization which fulfils its own goals through the original structure of institutions (mostly independent of Member States' influence) and through its own legal tools. The evolution of European integration is accompanied by the phenomenon of factual or material constitutionalisation. The EU becomes a new sovereign power. Its sovereignty does not in any way replace the sovereignty of the Member States. The EU does not absorb the states. On the contrary, it is a personification of their common project. When we accept that the EU is a new sovereign, it does not mean that we claim a loss of sovereignty on the side of Member States. States, as the original holders of competences, continue to be sovereign. They continue to be the crucial building blocks of the EU. They are, however, limited in order that they can achieve the common objectives of integration. In this situation we are facing a theoretical problem of how to reconcile the existence of two sovereign powers in one system.

An easy solution to this 'problem' would be to ignore the establishment of new structures and relationships, to consider the EU simply as a playground for inter-state games with no constitutional dimension. And to perceive Member States as the sole sources of authority. This view would, however, mean shutting our eyes to reality and negating the de facto level of integration. Once we accept the EU as a new player that has a crucial impact on (everyday) life in the Member States, we have also a duty to entitle it with a certain amount of sovereignty. Of course EU sovereignty is a product of blending functions, competences, but also unquantifiable factors, integration goals and some will to create a united Europe. But it is a fact. Some political views will continue to perceive EU membership as a threat to state sovereignty while others will see it as its materialization or even reinforcement (Heartfield, 2007). Theoretical approaches should, however, abandon these political

¹⁴ Point 147 Constitutional Court finding of 3 November, 2009, sp. zn. Pl. ÚS 29/09 Lisbon Treaty II.

evaluations and try to offer solutions, a clear perspective on the content of the concept of sovereignty and its understanding in the context of new social developments (Holländer, 2013). Přibáň (2010) claims that ‘Sovereignty, by definition undividable, has been divided to make sense of changes in multiplex legal and political structures of European societies’. This perspective accurately depicts what is happening in Europe. Sovereignty is a function; it is understood as an ability to secure the reproduction of values and as a way to satisfy social goals (Holländer, 2009c). And as such it should be shared by the Member States and the European Union.

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