

Part I
Constitutional Issues –
Basic Concepts Revisited?

Sovereignty In The European Way. How the *Euro Summit* Came Into Being and Got Itself a Permanent President

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Abstract

The Brexit decision to leave the EU is a miscarriage of democracy. It is an expression of UK sovereignty, proving not, however, that the Kingdom is retrieving its full sovereignty from the EU. Instead it proves that the UK's sovereignty has failed to evolve along with its membership of the EU and take on a European dimension.

This failure has seen UK sovereignty regress from a sophisticated parliamentary sovereignty to a regressive outburst of popular sovereignty. In other Member States, the same failure of evolution of sovereignty is latent and could lead to similar outbursts.

The first lesson for us jurists to learn from Brexit is that keeping the articulation of sovereignty to law and legal thinking, and to ourselves, is a mistake. Worse: constitutional and legal doctrine are to blame, in part, for allowing thought on sovereignty to be split up into incompatible positions and for leaving the notion defenseless against its hijack by populists.

Emmanuel Macron, first in his Humboldt plea for 'European sovereignty', provides a sound alternative. He denies the opposition between EU authority and Member State sovereignty and wants Member States to draw sovereign strength from their membership of the EU and from the latter's development. It is a new version of the pooling of sovereignties. We should give this a constitutional elaboration.¹

1 Emmanuel Macron on Sovereignty: Berlin, 10 January 2017 (Humboldt-Universität) www.rewi.hu-berlin.de/de/lf/oe/whi/FCE/2017/rede-macron; Financial Times 24 January 2017, 'Europe holds its destiny in its own hands' <https://www.ft.com/content/3d0cc856-e187-11e6-9645-c9357a75844a>; Athens, 7 September 2017 <https://en-marche.fr/artic/les/discours/>

Sovereignty must be seen not as an immutable idea or notion, but as a specific form of authority, to wit that of a (or the) State. Apart from its axiomatic belonging to the State, it is not static, but has evolved for hundreds of years and will keep evolving over time, together with the State. Membership of the Union presses for further evolution of both the Member States and their sovereignties beyond the current forms, and involving the structure of authority and representation of the EU. This must be given a constitutional acknowledgment, in which constitutional doctrine can help.

This piece is meant to open up our thinking in the matter. It centers on one crucial event: the instant creation of a new institution at the heart of the Union, the Euro summit and its permanent presidency, on 25 March 2010. In an emergency situation, the EU created for itself a new authority and organized it instantly. This happened outside the law but was a clear case, both of EU constitutional evolution and of evolution in the sovereign authority of euro Member States.

Introduction. Article 50 TEU

Article 50 TEU is, among other things, an enduring expression of individual national sovereignty for the EU Member States. Article 50 TEU is also a token of the EU as a Union born from an agreement, not from violence, maintained under an enduring agreement and not by violence. This precludes an ultimate monopoly of violence as that of the US federation and it is among the things precluding the EU from itself becoming a State. What is more: the whole EU Treaty, in its evolution, is an enduring expression of the sovereignties of the Member States collectively. So, sovereignty is at the heart of the EU constitution.

This allows to look at the EU constitutional situation under Brexit with an eye to finding things to learn, first about what went wrong in the UK, then about our understanding of sovereignty in general, and finally about the evolution of State sovereignty in and through the EU.

discours-president-athenes; United Nations, 19 September 2017 <https://en-marche.fr/articles/discours/discours-president-nations-unies>; La Sorbonne, 26 September 2017 (English version) <http://www.elysee.fr/assets/Initiative-for-Europe-a-sovereign-united-democratic-Europe-Emmanuel-Macron.pdf>; E. Macron, R.volution: R.concilier la France (French and European Publications Inc 2017).

Brexit: a miscarriage of democracy

The Brexit decision is an acute expression of British sovereignty *singly*. It shows this up, however, not as a regain of ultimate control but as a whimsical and impulsive form of popular sovereignty, departing from the trusted *parliamentary* sovereignty and resulting in what must be called a miscarriage of democracy. A less sturdy constitution than the British would have been in acute difficulty of survival. It is an enlightening paradox how the UK, an accomplished constitutional State, has been in political shambles since its secession decision while EU, an incipient constitutional authority, is keeping its act together and in control.² This suggests that there is, at least in these *extremis*, in the face of threats to the public realm from inside and outside, a better claim of control, and of sovereignty, in the EU Member States together than there is in the UK singly.

Brexit shows, among other things, what the consequences can be of our not coming to grips with sovereignty in the European Union. For the EU it is fundamental to have a sound notion of sovereignty, if only because sovereignty is often invoked as an argument, or a solid fact, in the way of any real (political) EU constitution. More assertively, national sovereignty needs to be understood as an element of the EU constitution, even as a principle of it, as AG Kokott has ventured to call it.³

Sovereignty in general and in the context of EU

Traditionally law scholars has been the first to define and tend to the notion of State sovereignty. But this task has been relinquished at the creation of the European Union, and legal doctrine has split up into different often irreconcilable positions, notably about the relationship of European integration and national sovereignty. First, there is the doctrine holding that sovereignty gradually loses relevance in the context of European integration. Another reading of the situation is that the EU is gradually taking over sovereignty from the Member States in the form of competences and with the legal precedence of EU law. Then there is constitutional plur-

2 See the European Council position <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/> the two years hence have only reinforced this evidence.

3 Opinion of 26 October 2012 in Case C-370/12 *Thomas Pringle v Government of Ireland*, par. 136

alism, in which sovereignty remains crucial, but is a mere 'claim to authority' of a polity in general, with the State losing its special status. In each of these readings, as in prevailing general views, there is at least a tense or even contradictory relationship between the EU and the sovereignty of its Member States.

In Emmanuel Macron's notion there is no such necessary contradiction; quite the contrary: there is possible synergy. His views are not alien to the ideas of multilevel or composite constitutions and to the old notion of 'shared sovereignty'. But while the latter primarily serves as doctrinal or justificatory tools in the realm of constitutional law, Macron's European sovereignty is militant, political, and defiant: 'we must reconquer our sovereignty'. First of all, he wants to keep the idea of sovereignty from being hijacked by populists.

Following Macron, we lawyers may stop our doctrinal squabbles and take the lead to find a notion of State sovereignty which not only agrees with the facts of European integration instead of opposing them, but which also allows for an original development of sovereignty in the EU, concerning both the Member States and the Union itself.⁴

The idea of EU sovereignty is not altogether strange to our thinking as EU lawyers, notably in the notion of 'pooled sovereignty'. Ingolf Pernice and others have developed ideas on 'divided sovereignty' in the context of multilevel constitutionalism. But it needs to be made concrete and related to actual fact.

The first thing to do is to demystify sovereignty. Sovereignty is not an idea, unfathomable or mysterious. It is, simply, a kind of authority, to wit the special authority of the State. It is distinct from other authorities, and stands above them. Sovereignty is, first, the ultimate authority of the State over societal movements and authorities such as markets, militias, religions: *internal sovereignty*. Second, it is the full membership of the State in the international community of States: *external sovereignty*. To further demystify it, we need to break the State's authority down into different spheres, or theatres where it is expressed and develops. Most difficult for us lawyers is to see it as something else but a matter of law and a matter of notion. Stefan Griller writes, typically: '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

4 See <https://plone.rewi.hu-berlin.de/de/lf/oe/whi/FCE/2017/rede-macron/>; Emmanuel Macron: 'Europe holds its destiny in its own hands', *Financial Times*, 24 January 2017.

Law'.⁵ Sovereignty is not rooted in theory; it is rooted in historic development. All authority has solid foundations in crude, basic fact. So does sovereignty. This face of sovereignty is often hard to understand for the scholar, but its understanding is also most liberating and even illuminating.

The sovereignty of France, like that of Germany and of the US, is not primarily a concept, but a fact. Anyone wanting to deal with the State, internally and externally, will profit from knowing that its sovereignty is a fact and that it hurts to deny or ignore it. Forget about the notion. Of course the *notion* of sovereignty is important to support and organize the *facts* of sovereignty to greater coherence and function in their context. This is in the same way that the *notion of a car* supports and organizes *actual cars* to greater intelligibility and better function in traffic.

Likewise, sovereign authority is more than a matter of law or legal authority only or mostly, but also a matter of *political* authority. When the Federal Republic in the turmoil after the fall of Berlin's Wall in 1989 launched its plan to absorb the German Democratic Republic, it took the initiative in a political act of sovereignty. Legal acts of sovereignty would follow from this: first, treaties (Unification Treaty and 2+4 Treaty) then legislation. Then, again, treaties, notably that of Maastricht.

Thus, sovereign authority is developed and expressed in several theatres: in that of fact, in that of action, in that of structure and in that of doctrine. All these theatres are different, each with its own casts of characters, even if they communicate to keep coherence. In the form of *doctrine*, sovereignty is expressed and elaborated internally in constitutional law and scholarship and externally in diplomatic practice, by academics, courts and government officials. In the form of *structure*, sovereignty is expressed in the context of legal systems, in constitutions and legal instruments, by treaties and legislation. In the form of *action*, sovereignty is acted by State authorities nationally, and among States internationally. In the form of *fact*, sovereignty arises from events at the origin of States, and subsists in the form of the raw fact of the States' existence.

Having originated with the State, first as a fact, then as a notion supporting the fact (Bodin, Hobbes), the authority of sovereignty has evolved with the State over time, both in the abstract and in each State specifically.

5 Stefan Griller, 'The Impact of the Constitution for Europe on National Sovereignty', in Jiri Zemanek/Ingolf Pernice (eds) *A Constitution for Europe: the IGC, the Ratification Process and Beyond*, ECLN series vol. 5 (Nomos, Baden-Baden 2005), pp 151–182, at 151.

It has evolved from god-given internal authority to legally established internal and external authority; from absolutist to parliamentary, to popular, to national, to constitutional, to democratic. As all authority, even that of law, sovereignty in its structure, in its means and instruments, and in its appearance will vary over time and between States. The only thing immutable is its appertaining to the State (in the abstract and in the concrete).

And with the inevitable evolution of every State, sovereignty's structure of authority evolves; often towards greater democracy and rule of law. With the evolution of the international community, international sovereignty evolves toward including greater sophistication in international organization.

Does it also evolve towards greater authority or weight of international organizations? That is uncertain generally, but unmistakably it does in the EU. What is more, the evolution of the authority of the EU presses for a constitutional restructuring of the Member States' sovereignties.

Such pressure can be creative, as is most obvious in the case of the Bundesrepublik. Created as a sovereign State only in name and form, in 1949, the new German State has completed and boosted its sovereignty in the seventy years hence. Today it is among the world's top in any ranking of sovereign States, both as a vigorous democracy and as a member of the world community, both internally and externally. And all this evolution it has been both pressed and allowed to make by its membership of the EU. Its sovereignty has a clear European condition and qualification. This is what M. Macron understands by European sovereignty and what he vies to obtain for France also, and for the other Member States. Anyone interested can read it from the facts. Only the Bundesverfassungsgericht (and its epigonist colleagues Courts) is blinded by its own legalistic doctrine from seeing the facts. And it is cornering itself and legal doctrine in a false dilemma. Fortunately, German politics is not fooled.

While Germany, having come last, has been the first to develop this extra layer to its sovereignty, it is the opposite with the first sovereign State in Europe, the present United Kingdom. It has been the last and most reticent to allow its sovereignty to develop under European integration. Brexit is the result.⁶

6 The argument of Germany's strong evolution under EU membership I have put forward in a keynote speech before the Dutch circle of constitutionalist on 15 December 2017, published as 'Germany's Grand and Growing European Sovereignty' in Hardt, Sacha, Heringa, Aalt Willem, and Waltermann, Antonia: *Bevrijdende &*

How does such evolution of a national sovereignty work? It works similar to natural evolution of a species. Each older version of sovereignty is overlaid in further steps, but preserved in the full heritage. It is like we humans carry along our animal (and even bacterial) heritages. Our European State sovereignties still carry the remains of godly authority, of kingdom, of popular revolt. Even if they have now landed into constitutional and democratic authority, these older forces and sources lurk below and can be awakened, as shown in the US and the UK these days.

We are concerned not with the past, however, but with its future evolution. Sovereignty, carrying all the baggage from its past stages, will evolve further *inside* the Member States due to their membership, and *between* them. This is already going on. It is our business to stop quibbling and together turn our attention to how our States' *structures* of sovereignty have in fact been evolving under pressure from EU membership. From there, we may find doctrinal underpinning and coherence.

An unhistoric idea of sovereignty is false. This goes for the recurring idea that sovereignty is always or essentially popular sovereignty as well as for the idea that sovereignty lies with the power of exception and for any other fixed idea.

Sovereignty as a notion: more than legal

Sovereignty is not merely a legal notion concerning legal power, but it essentially, actually and notionally also involves political authority. The fact that sovereignty is historic and evolving, in the way of a living species or (better) of a form of culture or technology, means that there is no final limit to its development or sophistication, or to its pooling in the context of the EU, however frantically this limit is looked for by legal authority, judicial or academic. The search and the evolution is a matter of history, politics and law, not of legal definition. No *idea* of sovereignty should be in the way of a development of the facts and the notion. Certainly not the legalistic idea that sovereignty amounts to a State's legal powers and that it inevitably is reduced by transfers. The evolution of the German State from 1949, involving power transfers while being strengthened, contradicts this idea.

Begrenzende soevereiniteit. (Boom juridisch, Den Haag, 2018), pp 10–31. See also editorial *European Constitutional Law Review* 2018–1: 'European Sovereignty'.

The challenge is to see what facts of sovereignty present themselves and what notion of sovereignty fits the developing relationship between the EU Member States and their Union. This is a challenge both in fact and in understanding. Let us pick one instance of such evolution, not a legal one, in order to avoid the idea that sovereignty is all about notions and about law. A single but brilliant little historic fact may help us to explore lines of the possible evolution of Member State sovereignty in the EU.

Creation of the Euro-summit and its permanent chair, Brussels, 25 March 2010

In a meeting of the European Council on 25 March, 2010, at a first peak of the financial crisis and euro-crisis, the members of the Eurozone were to pledge their solidarity with Greece, in order to keep the Greeks and the euro from going under. This pledge was momentous as an act of authority in the face of power of the money markets, not to forget its possible conflict with Article 125 TFEU (no bail out). The nine non-members of the EU were asked to leave the room! UK's Gordon Brown left last, protesting loudly. Most of this is documented in the recent book by Luuk van Middelaar, who was chairman Van Rompuy's close assistant at the time.⁷

Under this immense pressure, what happened, constitutionally speaking? Exceptional authority was exercised and new authority created. A new institution was born, in the heart of the EU executive: the Euro-summit, as it is now called. It was created not by way of legal decision, but by way of convention. This happened in the heat of the moment and under protest of some concerned. Both conditions helped towards the birth of this new institution: the pressure of events created the necessity; British protest marked the moment of the event and helped to articulate it.

When Brown had left, the question arose who was to chair this meeting? The first and only meeting in this format, autumn 2008, was convened and chaired by then rotating chair France's President Sarkozy. With Spain now in the rotating presidency of the EU, no wonder José Zapatero walked to take the chair. But in the meantime, on 1 December 2009, the office of permanent chair of the European Council had been created. Herman van Rompuy was in the chair and did not budge.

7 Luuk van Middelaar, *Alarums and Excursions. Improvising Politics on the European Stage* (Agenda Publishing, Newcastle Upon Tyne, 2019), p 200. This is the English version of his book in Dutch of 2017. The event was reported in greater detail in my own (TE) newspaper column in *Het Financieele Dagblad* of 7 May, 2010 on the basis of my fact-finding then. The facts reported have never been disputed.

Zapatero looked left and right for support, but did not find it in sufficient measure. Then he turned and went back to his seat. The showdown was over. Thus, Van Rompuy not only won the clash, but also his position for the future, a new institution and a new office for the Union constitution. The whole thing would be legally codified in the Fiscal Treaty of 2 March 2012, Art. 12.

There is no doubt that what happened on 25 March 2010 changed the EU constitution. A new institution was created in the heart of the EU executive, with a new office of permanent president. The change not only affected Member States' core sovereignties but was an expression of new authority created for the EU, an authority of sovereign substance and status, however limited.

Conclusion: suggestions for reading sovereignty and the EU constitution

How sovereignty will implant itself constitutionally into the EU structure is not clear. It will have to be read from the facts. A close reading of the above case of constitutional innovation may help to summarize, to conclude and to make some suggestions:

1. Sovereignty is not a notion alone, nor legal. It is, first, a fact in the form of an authority, to wit the essential authority of the State. This goes for sovereignty both as fact and as notion, the two supporting each other.
2. Sovereignty is inherent in States and in their constitution. As a matter of fact and as one of notion, sovereignty has originated and evolved with the State and will continue to do so.
3. Sovereignty is not a given, neither as fact nor as a notion. There is no immutable idea behind neither the facts nor the notion of sovereignty. Nothing prevents its evolution towards the EU wielding original political authority in agreement with the sovereignties of its Member States.
4. Neither the facts nor the notion of sovereignty is exclusively legal. To consider sovereignty a matter of law and of legal doctrine alone leads to deception. On the other hand, to consider sovereignty as essentially non-legal, as Carl Schmitt held, is equally deceptive.
5. Sovereign authority in the context of the Union will come about and be exercised respectful of Member State's sovereignties while pressing these to evolve. It is not only a matter of dividing nor of sharing or pooling sovereignty, but of finding a new constitutional structure. The

UK Government and constitutional doctrine has failed to make clear to the public that the evolution of the EU is no necessary threat to UK sovereignty even if it provides evolutionary pressure to the structure of executive authority and representation, and even judicial authority which has to be acknowledged, expressed and given form, at the national level.

6. There is no identifiable limit in law to the evolution of the Member States or to that of their sovereignties in the context of the Union, their 'European sovereignty'.
7. We want to study the EU constitutional development to understand it as an evolution of the facts and notion of sovereignty of the member in conjunction with the constitution of the EU. The latter will concern:
 - a) EU original executive authority, as developing e.g. in the Euro-context and exemplified by the case above-mentioned;
 - b) EU original legislative and representative authority, as developing out of two sources. First, the Member States' treaty making power evolving into EU *primary* legislation, in name and in fact of authority. Second, in the original authority of EU *secondary* legislation. Most critically, this development will be led through the original representative authority of EU citizens by the European Parliament as provided in Arts. 10 and 14 of the EU Treaty since Lisbon.
 - c) The Bundesverfassungsgericht's square denial, from the Maastricht Urteil through the Lisbon Urteil and upheld to today, of the European Parliament's representation of EU citizens is an unlawful denial of the possibility of German sovereignty to evolve and include representation of Europeans.⁸
 - d) EU original judicial authority (autonomy, precedence), as claimed by the ECJ and in most part agreed by most who are subject to it (Member States, courts, private parties). The problem is that this authority articulates itself clearly only in legal terms, ignoring wider than legal claims *and* pretending these wider claims have also been agreed. But supremacy of EU law and the autonomy of the legal order are *not* expressions of full EU supremacy or of its autonomy, let alone its sovereignty.

8 BVerfG 30 June 2009, 2 BvE 2/08, para 284: Das Europäische Parlament bleibt vor diesem Hintergrund in der Sache wegen der mitgliedstaatlichen Kontingentierung der Sitze eine Vertretung der Völker der Mitgliedstaaten.

8. If we constitutionalists don't come to terms with Member State sovereignty as evolving in the context of EU, this will be a disservice to the field of EU constitutional law.
9. Member States that don't come to terms with their sovereignty as an essential remaining attribute yet necessarily evolving under Union membership, will remain a liability in and to the Union.
10. As to Brexit. At finalizing this paper (Thursday 20 April, 2019), the present author nor anyone else can know what the British miscarriage of democracy on 23 June 2017 will ultimately bring forth. But some decision is inevitable. As an optimist, whose understanding of developments is oriented by hope, I perceive a possibility for the crisis to lead to a redeeming change in the structure of UK politics and even a change in the constitution.

The saving change in UK politics needs to tackle, probably, as one never can be sure of the way redemption takes, two elements. First, the polarity between the two dominant parties; second, each of their crucial internal divisions over the EU.

The change in the UK constitution would have to involve an acceptance of the evolution of UK sovereignty in fact and its notion to include membership of the Union as one of its pillars. It would remain a parliamentary constitution under the sovereignty of Parliament, but has to become, in addition, *the European* sovereignty of the UK, accounting for the representative input of the European Parliament and for the executive input of EU executive bodies, notably the European Council and its progeny, such as the Euro-summit.

It is my hope as a scholar, that the present piece will be a help to understanding prospective events in the Brexit saga beyond the date of Easter 2019, when the piece was finalized. And that the events will have turned or channeled the immense political pressures into development, British and European. As is and will always remain in the powers and ingenuities of politics⁹.

9 All this in the spirit of Bernard Crick's classic *In Defence of Politics*, London, Penguin, 1992, fourth edition (my copy); first: 1962.

