Sovereignty in the EU Constitutional Order

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Sovereignty in the EU Constitutional Order:

Integrating Law and Political Science

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SOVEREIGNTY IN THE EU CONSTITUTIONAL ORDER: INTEGRATING LAW AND POLITICAL SCIENCE

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Abstract: This paper examines how law and political science have studied the role played by sovereignty claims in the EU constitutional order. Typically, it is argued, the two disciplines have studied sovereignty in the EU from parallel perspectives, with the former emphasising the dimension of the internal sovereignty of the EU and the latter focusing on member states' enduring external sovereignty in relation to the international system. This divergence is explained by virtue of contrasting institutional units of analysis (courts vs. representative institutions). The consequence is the absence of a shared understanding of where Kompetenz-Kompetenz, the power to decide who decides in the EU system, lies. In the light of this analysis, three models of sovereignty are then discussed as models for spanning the disciplinary boundary. These are the Westphalian, post-sovereign and confederal models of sovereignty. Amongst them, the paper concludes, it is the latter that seems to offer the greatest opportunities for reconciling insights from law and political science.

Keywords: sovereignty, European integration, interdisciplinarity, law, political science, international relations

Sovereignty in the EU Constitutional Order: Integrating Law and Political Science

1. Introduction: Sovereignty and Constitutionalism in the EU Polity

The question of sovereignty has seldom been absent from debates about the impact of European integration on the nation-state (Hoffmann, 1966; Jackson, 1999; Walker, 2003), leading lawyers and political scientists alike to grapple with the ontology of state sovereignty in the EU. Yet typically scholars in the disciplines of law and political science – in which we include international relations scholarship – have studied sovereignty in the EU from parallel perspectives. Whereas the former concentrate on the supranational first pillar as somehow characteristic of the whole EU system (Weiler, 1999; Maduro, 2003) the latter prefer to dwell on intergovernmental decision-making (Moravcsik, 1998; Pollack, 2005) and the possibility of exit (Sørensen, 1999; Boucher, 2005) when determining the effects of integration on member-state sovereignty.

The result of these research endeavours is thus two rather different approaches to the complex question of what role sovereignty plays in the functioning of the EU constitutional system. For lawyers, nation-state sovereignty is often considered in practice, if not in principle following ECJ jurisprudence, superseded and theoretically of little interest; for political scientists, sovereignty – from which *inter alia* veto power, venue shopping and opting out derive – is a key concept for explaining empirical puzzles about why and how integration proceeds. Hence the aim of this paper is twofold. Firstly, to discover what common ground may nonetheless exist between legal and political science approaches to sovereignty in the EU and, secondly, to explain why integrating

such perspectives is necessary to understand better the constitutional politics of European integration.

However, it is first necessary to provide an account of sovereignty that can straddle the disciplinary boundary between law and political science. In order to do so, it is necessary to understand sovereignty as a 'plausible claim' (Walker, 2002: 345) to a particular status. The claim must be asserted by some sovereign entity, with a variety of available repertoires whether in the shape of a constitutional preamble, a declaration of independence or even a court ruling. Moreover, such a claim has to be accepted or internalized by a specific audience – as often evinced by the rhetorical form taken by the original sovereign assertion for which the *locus classicus* is the 'we hold these truths to be self-evident' of the US declaration of independence. Consequently, the acceptance of such a sovereignty claim serves 'to legitimize certain rights, duties and competences' (Werner and de Wilde, 2001: 297) exercised by political authority. Sovereignty, therefore, is above all a relational concept (Loughlin, 2003: 83-86) whose exercise depends precisely on the successful internalization by the specific target audience of the claim to a certain status.

Nonetheless, it is also vital to distinguish between two bifurcated components of sovereignty, namely its internal and external dimensions. This is because the *content* and *audience* of a sovereignty claim differs in each dimension. The internal dimension of sovereignty is bounded, as in this context the status claim consists of the claim to ultimate decision-making authority in a certain territory. The audience for such a claim relates to those over whom sovereignty is supposed to be exercised: a people, subjects or other institutional actors.

By contrast, the content of a sovereignty claim in the external dimension consists in the claim to parity of status among *peers* – i.e. other sovereigns. This implies a right to be treated equally, a legal standing, and thus a 'right to participate and engage in relations and to make agreements with other sovereign states' (Jackson, 1999: 453). Naturally, such a claim also implicates a different audience. The external audience consists of those entities that can plausibly make *similar claims to such status,* i.e. other sovereigns. Yet these entities are precisely those that internally share the claim to ultimate decision-making authority over a certain territory. In other words, sovereignty claims are Janus-faced and thus conceptually the internal and external dimensions cannot be cleaved. Yet the study of sovereignty is often based on examining the gaze of only one head of the sovereign Janus. Thus the internal dimension is the traditional subject matter of constitutional law and political theory (notably the social contract tradition), whilst the external dimension is the domain of international law and international relations.

However, the process of European integration largely confounds such parallel studies of the internal and external dimensions of sovereignty because neither the content of nor the audience for sovereignty claims in either dimension is peremptorily settled. As an "in between order" (Wind 2001, 103; cf. Sørensen 1999) bridging the gap once thought to exist between federation (externally sovereign with limited internal sovereignty) and confederation (limited in both internal and external sovereignty), the EU should render integrated study of the content and audience for both dimensions of sovereignty unavoidable. Yet legal and political science scholarship has continued to struggle to come to terms with this conundrum, as explained in the following section.

2. Sovereignty in Perspective: Legal and Political Science Approaches to EU Integration

Legal Approaches to Internal Sovereignty: Kelsen's Grundnorm and Legal Pluralism

Naturally it is the internal dimension of sovereignty that has most informed legal approaches to sovereignty in European integration, at least in terms of the ontology of law and sovereignty understood from the perspective of national (as opposed to international) law. The conceptual framework for such a perspective is essentially derived from the legal theory of the Austrian jurist Hans Kelsen and English theorist HLA Hart. For this dominant tradition of legal theory, sovereignty constitutes a legal fact; the highest norm or fundamental law (Walker, 2001) of the legal system that nourishes the validity of all the other norms of the given territory.

In his *General Theory of Law and State*, Kelsen attempts to overcome the 'unsatisfactory situation of political theory' (1945, 181) by postulating the concept of sovereignty from a 'purely juristic point of view' (*ibid*.), which essentially attempts to give an account of law and the state on its own terms, that is, in an exclusively normative conceptual space. It is this Kelsenian approach to sovereignty, it is argued, which forms the basis for the vast majority of mainstream legal analysis of sovereignty in the European Union.

In Kelsen's theory of law and sovereignty, the state (and, as a corollary, sovereignty) is the personification of a legal system in its totality. For Kelsen, the totality of a legal system – and therefore the state – is made up of one element: a norm (*ibid*, 110). This forms the 'atom' of a

legal system from which the legal structure and ultimately the state and sovereignty, all derive. Like an atom, a norm has two particular component parts:[1] its validity and its efficacy.

For Kelsen, a legal system is a 'multitude of norms' (*ibid*., 110). In systematizing a series of norms, Kelsen organizes the multitude according to the individual provenance of the validity of each particular norm which, given that a norm constitutes the atom from which the legal universe is made, must be another norm (*ibid*., 111).[2] This other validating norm is in a relationship of hierarchy to the original norm, which is in turn validated by another, more general, norm and so on in an iterative process which systematizes the series of norms pertaining to a legal system *hierarchically*. Thus:

> the legal order, especially the legal order the personification of which is the State, is therefore not a system of norms coordinated to each other, standing so to speak, side by side on the same level, but a hierarchy of different levels of norms. (*ibid*., 124)

This notion of validating and validated norms thus entails that the whole order of legal norms are arranged hierarchically rather like the pattern of a *galero*, or cardinal's hat. In essence, the logic of a hierarchical normative system is one of degrees of particularization. Thus, a norm which owes its validity to a higher norm can be seen as a more particular expression or application of the higher norm and so on. Clearly, this iterative process must reach an end point – which must also be a norm, given that a norm's validity can only be granted by a higher norm[3] – which is the 'basic' norm, the so-called *Grundnorm*, constituting the 'crown' or apex of the system. This *Grundnorm*:

[1] A proton and a neutron. The discovery of sub-atomic particles is ignored for the purposes of this analogy.
[2] This highlights the 'purity' of Kelsen's theory of law, which after all is a deliberate attempt to describe the state and sovereignty in purely juridico-normative terms.
[3] The 'reason for the validity of a norm is always a norm, not a fact', (Kelsen, 1945: 111).

> constitutes , as a common source, the bond between all the different norms of which an order consists. That a norm belongs to a certain system of norms, to a certain normative order, can be tested only by ascertaining that it derives its validity from the basic norm constituting the order. (*ibid*., 124).

However, given that the validity of a norm cannot be anything other than another higher norm, and the fact that a norm cannot rely on itself for its own validity, the basic norm is a 'meta norm' whose validity is *presupposed* (ibid., 116). Thus, the basic norm is a hypothetical postulate, and constitutes the 'universal' norm that constitutes the source of validity for all the norms of the legal system. Hence the *Grundnorm* is postulated as a necessity. It is a vital element to any 'positivistic interpretation of the legal material' (*ibid*.).

In legal terms, therefore, sovereignty is a function of the *Grundnorm,* which in turn exists only in relation to the constitution – this is what makes all norms emanating from the constitution the law of the land. This particularly legalistic approach to sovereignty constitutes a form of "constitutional legalism" (Loughlin, 2003: 47), which treats the constitution – or more specifically, the *Grundnorm* presupposed in relation to the constitution – as the source of authority, and the 'fundamental law' of the polity. Once the precepts of this fundamental law are enforced by the judiciary, the law provides the foundation of the political order (Loughlin, 2003: 47). It is precisely this constitutional legalism that has informed the discussion of sovereignty and constitutionalism in the European polity.

All students of EU law are familiar with the development of the constitutional doctrines of the legal system of the European polity through a series of seminal judgments. Proceeding in this manner, the Court found that European treaties and the secondary law of European political institutions had a direct effect in national legal systems – meaning that they could be relied upon in national courts just like national law (*Van Gend en Loos,* 1963), and, perhaps more strikingly, that the law of the European polity was to be supreme over national law in cases of conflict (*Costa v. ENEL*, 1964). These doctrines along with others (implied powers etc.) have formed the basis of the constitutionalization of the EU legal order and as such have provided the starting point for legal analyses of consitutionalism and sovereignty with respect to the European polity. Added to this, the Court's designation of the treaty of Rome as the EU's 'constitutional charter' (*Les Verts,* 1986), have resulted in it becoming an article of faith among lawyers that the polity has a sovereign *Grundnorm* which makes the treaties the supreme law of the land in the now 27 EU Member States. Significantly, therefore, the tenor of this constitutionalization of the EU's legal system through ECJ jurisprudence corresponded neatly with the Kelsenian concept of an internal legal order. Thus, it is hardly surprising that the treatment of sovereignty and constitutionalism in legal scholarship on the EU is predicated on the assumption that a treaty system presupposes a *Grundnorm* and that as such the EU is now sovereign.

This perhaps slightly complacent approach to sovereignty in the EU was given a particular jolt by various protests from national constitutional courts who registered problems with the idea that the treaty system establishing the EU polity was the supreme source of law in the member states. *Brunner* (1994) from the German Constitutional Court is frequently trotted out to illustrate this discomfiture. However, there have also been other various moments when national constitutional courts have signalled their unease with the ECJ's reading of the treaty system, naturally claiming

that national constitutions represent the highest legal authority in their states and that EU law applies in national jurisdictions to the extent that it does not offend the fundamental law of the respective member states.

Such protestations resulted in the development of a *pluralist discourse* in EU constitutional legal literature, whereby each claim to legal sovereignty at the EU and member state level is considered to be equally valid as long as the other's right to exist is not challenged. This is because the latter situation would, in one author's words, lead to 'mutually assured destruction' (Weiler: 1999: 320). However, the unusual nature of European integration in terms of the creation of a separate supranational institutional level for making law and policy has also led to a further development in how sovereignty is conceived in legal scholarship. This alternative approach sees sovereignty as an issue of *competence*, defined in terms of the expression of the absolute power of the sovereign to enact law (Loughlin, 2003: 84). Thus, in this model, the resolution to the mutual challenges from national courts and the European Court of Justice is to be found courtesy of the German concept of public law known as *Kompetenz-Kompetenz*. This is the notion that it is the exclusive power of the sovereign authority to determine the limits of its own competence, or as one commentator has put it, the 'power to decide who decides?' (Maduro, 2003b: 76). Various candidate solutions to this problem have been proposed: from finding an answer in international law (MacCormick, 1999), to the creation of a 'super constitutional court' (Weiler: 1999) which would be made up of both ECJ and members of national constitutional courts. The problem with such an approach is evident given that the origin of such constitutional disputes is precisely rival claims to legal sovereignty, articulated by systems that acknowledge themselves as the highest legal authority. As MacCormick (1999: 109) puts it: 'the highest authority in any normative order can appeal to no higher positive confirmation of its own authority than that enshrined in its own jurisprudence'.

Thus legal approaches to sovereignty and constitutionalism in the EU have been predicated on the interpretation of internal sovereignty as fundamental law and the ultimate source of authority in a legal system. In this context, the ECJ's constitutionalization of the treaties through its jurisprudence – considered the most telling indicator of *Kompetenz-Kompetenz* – have provided scholars of the EU legal order plenty of reasons to consider the EU is now sovereign legal order. Moreover, when challenges to this *fait accompli* have been acknowledged, lawyers have generally consigned resolution of the *Kompetenz-Kompetenz* struggle either to the realm of politics or have unsuccessfully tried to adopt a pluralist method for solving conflicts of laws.

Political Science Approaches to External Sovereignty: International Crises, Opt-Outs and Treaty Revision

In political science, the existence of the EU is typically considered the most significant contemporary challenge to the Westphalian notion of state sovereignty. This is why the process of European integration features prominently in recent debates over the nature of sovereignty in contemporary international politics. For some scholars, the EU does not compromise essential state sovereignty (Sørensen, 1999; Boucher, 2005) because of the indubitable possibility of legitimate exit from what after all remains a treaty system. Such a possibility puts the EU at odds with virtually all historical examples of federalism since only the constitution of the USSR (in principle) permitted voluntary withdrawal of a territorial unit. Others, however, have preferred to examine the process of integration in order to quantify in some way the extent to which sovereignty – meaning a set of competences – has been pooled in the EU (Donahue and Pollack 2001: 107; Börzel, 2005:221-3).

Yet another approach entails tracing governmental motives for this common undertaking to demonstrate how the pooling of sovereignty conforms to member state interests (Moravcsik, 1998) or political ideologies of integration emerging from domestic party competition (Parsons, 2003). Finally, an alternative conceptual framework has tried to portray the effects of integration upon state sovereignty as something other than a zero-sum game. This claim relies on the notion of "interdependence sovereignty" (Krasner, 1999), a move that follows Keohane (1995) in treating sovereignty as a bargaining resource. Conceptualized in this way, the aim is to explain the somewhat perplexing situation whereby European states are losing individual control over certain transnational interactions whilst gaining a collective capacity to deal with them.

In other words, when sovereignty is part of a conceptual or empirical research puzzle in political science, the focus of the analysis is largely on either issues of substantial statehood as a capacity for certain interactions with other sovereigns or on the behaviour of certain political actors during such interactions, notably national executives. Given the enormous literature on both these aspects of integration, it will be sufficient here to examine three components of member states' external sovereignty that have attracted much scholarly attention from political scientists trying to understand the role of sovereignty in the EU constitutional system: international crises, opt-outs and treaty revision.

Over the last decade, EU foreign policy has increasingly come to be seen as the crucible for hopes of a more legitimate EU polity. These aspirations are often contrasted with the evident difficulties the EU has had in projecting a coherent foreign policy in moments of international crisis and run counter to eurobarometer polls suggesting public opinion would prefer more EU leadership in this area. Political scientists have explained this paradox in two ways, each one linking the problems

encountered by the EU's nascent Common Foreign and Security Policy to the unsettled issues of state sovereignty.

Firstly, there is the explanation that the 'high politics' of foreign policy (Hoffmann, 1966) is simply not amenable to the same kind of European co-operation that is possible in bread-and-butter issues of agriculture or safety standards. Such a logic of *Primat der Aussenpolitik* takes different forms given the desire of some states to remain neutral (Hoffman, 2000), to pursue foreign policies reflecting different domestic party coalitions (Rathbun, 2004) or even to delegate to the EU the role of promoting 'normative values' (Manners, 2002) rather than getting its hands dirty in violent conflicts. All strands point to the preservation of state sovereignty as the independent variable accounting for the EU's stillborn CFSP. The second approach is based on highlighting the institutional difficulties CFSP faces as a result of member states' prickliness over sovereignty. Focusing on the inherent difficulties of supranational decision-making in the third pillar – deliberately designed to shield state sovereignty from unwonted encroachments – these scholars identify weak institutionalisation (Forster and Wallace, 1996) and the absence of inputs from the Commission or the Parliament (Cameron, 1998: 66) as the root cause of Europe's fecklessness in foreign policy in times of acute international crisis.

Ad hoc policy 'opt outs', negotiated to allow certain member states to agree to incremental advances in integration without compromising certain 'red lines' of sovereignty, have also been used to discern the true nature of state sovereignty in the EU order. Recalcitrant member states thus agree not to block treaty reform on condition that they will not be bound by certain new arrangements. The first opt-outs were brokered at Maastricht in 1992. The UK opted out of the third stage of economic and monetary union, the single currency, as well as spurning the Protocol

on Social Policy.[4] Denmark similarly refused to convert to the euro and also turned its back on defense co-operation in the nascent Common Foreign and Security Policy. Although the opt-outs on the single currency were initially considered to be merely temporary derogations, more than a decade later Denmark and the UK still remain beyond the euro pale, whilst Sweden, not a member state at the time of Maastricht, unilaterally refused to join. Moreover, the trend of opting out has continued with the UK's decision to withdraw from the Lisbon Treaty's provision for making the Charter of Fundamental Rights legally binding when applying EU law.

As concessions to state sovereignty, these opt-outs are highly visible and symbolically very significant. Indeed, it is arguable that certain non-member states have negotiated their relationship with the EU on the basis of identity-based sovereignty claims: in this sense non-membership is simply opting out writ large. Such states privilege the symbolic value of staying outside the fold above having a say in a process of integration into which they are inexorably drawn. Hence non-membership is nevertheless compatible with participation in Schengen (Iceland, Norway and Switzerland), the adoption of single market legislation (Iceland, Norway and Switzerland) and even financial solidarity (Switzerland awarded one billion francs to the 2004 accession states). What Kriesi and Trechsel (*forthcoming*) call 'quasi-membership' for Switzerland is, therefore, above all a symbolic opt-out from integration for the sake of preserving the shibboleth of sovereignty. Nevertheless, advanced research on opting out reveals the discrepancy between the symbolism and reality of such devices when it comes to safeguarding sovereignty and resisting Europeanisation (Adler-Nissen, 2008).

[4] The UK subsequently signed up to the Social Protocol in 1997 following a change of government.

Finally, political science has also studied the question of external sovereignty in the EU system with reference to the arduous process of treaty revision. Revising the treaties is perhaps the most fraught process of integration because each member state brings to the table the sovereign right to refuse to sign a new treaty. Understanding the instrumental way in which this sovereign power is used by executives during treaty negotiations has spawned a voluminous literature examining, most notably, game theoretical analysis of veto power (Tsebelis and Yataganas, 2005) and the two-level process of reconciling bargaining at the international level with the policy preferences of domestic interests (Hug and König, 2002).

Consequently, political scientists' treatment of sovereignty in the EU runs counter to most of the fundamental assumptions under-girding legal scholarship. This is because member states' negotiations amongst themselves when it comes to responding to international crises, opting out or revising the treaties is assumed to reflect the fact that these same entities are the ultimate decision-making bodies in their respective territories. Without this exercise of internal sovereignty, these states would have no right to be at the negotiating table; a fact that is not lost on those regions with ambitions of statehood.

Yet paradoxically it is currently the process of treaty revision – ostensibly the best proof of member states' unfettered claim to sovereign status – that appears to undermine certain assumptions about the endurance of member state sovereignty. This is evidenced by the fallout from failures to ratify treaty revision when using referendums over the last two decades. The refusal to accept the Maastricht and Nice treaties by the Danish and Irish people in 1992 and 2001, respectively, only led to the holding of subsequent referendums to overturn the initial decision once the other member states indicated that no other treaty negotiation was feasible.

Furthermore, the defenestration of the Constitutional Treaty, courtesy of French and Dutch voters in 2005, resulted in a conscious re-packaging of the vast majority of the treaty in a manner that would not require referendum ratification. Hence the resolution of the current constitutional crisis concerning Ireland's rejection of the Lisbon Treaty will go some way as to indicating what has happened to state sovereignty in the EU. After all, according to article 40.4 of the Vienna Convention on the Law of Treaties (1969), states cannot be forced to become parties to amended multilateral treaties to which they have not consented (Witte 2004b) and yet despite pressure from other member states the Irish government refuses to countenance another referendum.

3. Explaining Disciplinary Divergences between Law and Politics and the Problem of Understanding *Kompetenz-Kompetenz*

The above section sketched the major theoretical and empirical approaches used in turn by law and political science to address the question of the role and importance of sovereignty in the EU constitutional system. The task at hand now in this section is thus to explain the reasons for such disciplinary divergences and the empirical and conceptual problems this gives rise to when trying to understand where sovereignty lies. The explanation of the contrasting perspectives offered by law and politics highlights the different institutional unit of analysis pervading either discipline. This in turn derives from a different understanding of the role political institutions play in the separation of powers. As a result, it is argued, the task of finding a shared understanding of the nature of *Kompetenz-Kompetenz* in the EU is greatly complicated.

The Institutional Unit of Analysis

Much of the divergence with respect to how law and political science approach the problem of sovereignty in the EU can be explained by virtue of a certain institutional parochialism. Lawyers tend to overemphasize the role of the Court and its doctrine, thereby underplaying the importance of the political context framing the Court's decision-making and the fact that a Court whose decisions go unheeded or unenforced is irrelevant. This point is emphasized by Alter (1996: 458) who notes that 'to put it bluntly, the ECJ can say whatever it wants, the real question is why anyone should heed it.'

Lawyers also tend to accept the dictates of supreme courts without sufficient consideration of how such courts function in a wider constitutional context. There is a certain logic behind this polarized view of constitutional politics. Given that supreme/constitutional courts have become the authoritative interpreters of constitutional texts, a remarkably swift development occurring after the second world war (Stone Sweet, 2003), it is natural to look to such courts for the definitive word on the configuration of a political system at any given time. Indeed, in many ways, these courts and their jurisprudence constitute the 'constitutional consciousness' of a polity.

This understanding of constitutionalism relates both to the nature of constitutional texts and the role of courts in dispute resolution. Constitutional documents, are replete with gaps, silences and abeyances, some deliberate and some less so (Foley, 1989). These gaps call for interpretation, a role that Courts seemingly are best equipped to play. This is, of course, not to say that Courts remain the exclusive interpreters of a particular constitution (in France, for instance, the other branches of government have a strong role in constitutional interpretation), rather that they

remain perhaps the body with the last word on what the constitution means. Such a function has been explained through the work of Shapiro and Stone Sweet on the role of constitutional Courts in providing a forum for the resolution of political disputes between branches of government to facilitate the process of governing. This has led to a 'judicialization' (Stone Sweet: 2000: Chapter 1) of constitutional politics which has become an almost unimpeachable given in Western constitutional democracies (Stone Sweet, 2003).

Herein lies the reason why political scientists have studied sovereignty in the EU from a different perspective to lawyers, with the resulting competing conclusions: the two disciplines differ in their understanding of the principle of the separation of powers. Modern legal theory is predicated on the belief that a constitutional system requires judges to check the actions of a democratic legislature and executive against the *Grundnorm* (Bellamy, 2007); political science does not conform to this legal orthodoxy. Instead, the contemporary study of politics is principally devoted to understanding the political processes – largely the results of representatives and elections – that determine the nature and scope of the constitutional context itself. Consequently, the two disciplines approach the EU differently not only on the basis of the institutional unit of analysis (courts vs representative institutions) necessary for understanding the role and importance of sovereignty in the EU system. In addition, law and political science assume a different degree of resolution to the fundamental question of who is sovereign, which can be described better as the problem of understanding *Kompetenz-Kompetenz*.

The Problem of Locating Kompetenz-Kompetenz in the EU

This received notion of courts as the forum for dispute resolution in constitutional conflict as well as the authoritative interpreters of the constitution is precisely what lends succour to EU lawyers' keenness to interpret ECJ jurisprudence as demonstrative of a successful sovereignty claim in the EU political system. In any case, the normative Kelsenian understanding of constitutionalism assumed by lawyers implies the presence of sovereignty as the source of fundamental law that can hold in check the actions of democratic political institutions. In turn this interpretation begets a focus on the issue of competences, given that once courts interpret the constitutional norms of a polity, their competence to determine their own ability to judge whether governing institutions have met these norms becomes a central issue. This explains EU lawyers' obsession with *Kompetenz-Kompetenz.*

Indeed, the definition of sovereignty as competence over competences seems at first glance to offer a more promising way of finding common ground on this subject between legal and political science scholarship. Such a conceptualisation inevitably focuses attention on the complex nexus of law and politics pervading the EU constitutional system. Yet even the study of sovereignty as the task of determining who sets the boundaries to EU and member state competences has largely failed to bridge the gap between law and political science. As explained below, this is because lawyers have interpreted the ECJ's unwillingness to be bound by the strict compartmentalisation of competences, imposed through the "pillar system", as definitive proof of EU sovereignty. However, such a peremptory finding fails to acknowledge that the political latitude afforded the ECJ to resolve disputes through law is far from unlimited and thus that the ECJ's sovereignty claim is hardly incontrovertible.

The EU constitutional system at present is not purely based on supranational decision-making. The 1992 Maastricht Treaty introduced the tripartite pillar system (with a somewhat stretched analogy to a classical temple) in order to balance supranational and inter-governmental decision-making principles in a fashion acceptable to the member states. The result was a compartmentalisation of competences. In the first pillar, qualified majority voting (QMV) for policy-making based on legislative initiatives emerging from the Commission and with the whole governance arrangement overseen by the ECJ is now the norm. This pillar co-exists with two inter-governmental pillars in which decision-making is almost the exclusive prerogative of the Council of Ministers and where the whole governance arrangement is insulated, to varying degrees, from the institutions of supranational representation, namely the Commission, the European Parliament and the ECJ (Börzel 2005). Even though the Lisbon Treaty abolishes the pillar system, the circumscription of supranationalism – and in particular ECJ jurisdiction over sensitive policy areas such as foreign policy – is maintained.

However, this pillar arrangement has certainly not abolished the EU's ability – through the ECJ – to exercise at times *Kompetenz-Kompetenz*. The pillar system gives rise to two different legal orders: the Community and the Union. This reflects the different degree of supranationalism contained in each policy-making area. The intention behind this separation is to ensure that jurisprudence within the Community order does not have direct legal effects in the areas covered by the Union (Miettinen, 2007); in this sense the creation of the two legal orders is the member states' belated reaction to the 1963 ruling on direct effect (Alter, 1998). Nonetheless, the ECJ has not simply resigned itself to the maintenance of this parallel constitutional system.

A recent case, *Environmental Legislation Litigation* (2003), demonstrates clearly the court's doctrine that the pillar system cannot prevent the ECJ from establishing whether the legal principles applicable in the Community order are to have any direct effects in the other two pillars. It is in this fashion that the EU can exercise competence over competences. In this particular case, the Court ruled that the Council of Ministers had trespassed upon community competences by seeking to establish an EU-wide basis of criminal sanctions for breaching environmental legislation through a Framework Decision invoking the third-pillar legal order. Although the ECJ acknowledged that criminal law was not a competence of the first pillar, it nonetheless argued that this did not:

> prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective (Case C-176/03)

Thus the need to create a regime of criminal law sanctions for environmental degradation was interpreted as a subsidiary of the EU's competence in the field of environmental policy, which meant the use of legislation in the third pillar was inappropriate to address this problem. Such a ruling has certainly been grist to the mill for lawyers seeking to explain that state sovereignty is no longer apposite in the context of the EU constitutional system. However, from a political science perspective, the location of *Kompetenz-Kompetenz* is not at all fully resolved in the EU.

Briefly put, the legal obsession with ECJ jurisprudence does not properly take account of what can be termed the 'strategic space' (Helfer and Slaughter, 2005), or 'acceptable latitude' (Garrett and Weingast, 1993), within which the EU's chief court operates. This strategic space reflects member states' expectations about the purposes and limits of integration as well as their attempts to both pre-empt and respond to ECJ rulings. Consequently, this space is partly determined by *ex ante* measures to limit competence over competences, as best illustrated by the creation of the pillar system. However, it is also the product of 're-contracting', whereby the member states can change the rules of the game or at least send a strong signal to the Court about the tenor of its future jurisprudence.

Such re-contracting has occurred on an *ad hoc* basis during the last few rounds of treaty revision. Thus in the Maastricht Treaty, following a 1991 case in Ireland where the ECJ was confronted with the question of whether abortion is a service, a protocol was inserted to guarantee that in the future the ECJ would not affect Irish policy on the right to life of the unborn. The intention was thus to ring-fence a certain area of national decision-making, which is why it caused such consternation among lawyers who feared this might constitute the opening of a Pandora's box of states trying to fetter the discretion of the Court (Curtin, 1993). Similarly, during negotiations for the Amsterdam treaty (1996), a treaty amendment was introduced in response to the ECJ's 1995 *Kalanke* ruling – which cast doubt on the legality of affirmative action for gender equality – in order to re-affirm the legality of national positive action measures addressing gender imbalance. Finally, as part of the negotiations for the Lisbon Treaty, the governments of Belgium and Austria obtained a five-year reprieve from the European Commission, which promised not to pursue further action against them for having introduced quotas limiting the intake of non-resident EU

students in certain higher education courses. This action was a response to a 2005 ECJ ruling that found these quotas to be in breach of the principle of freedom of movement.

Hence all these *ad hoc* instances of member states responding to ECJ jurisprudence are derived from, and made possible by, the very principle of member state sovereignty. As parties to the treaties establishing the EU and its institutions, they have been able to redefine the strategic space or acceptable latitude they believe the Court should function in. In addition, the possibility of exit now made explicit in the Lisbon Treaty but which was already implied by the treaty system (De Witte, 2004) obviously demonstrates that the ECJ cannot, in the last resort, force a member state to remain in the EU and accept its own competence. The same also holds true for treaty revision: it is only the other member states, not the ECJ that can badger a recalcitrant member state into holding another referendum on a new treaty should an earlier vote have failed. Consequently, it cannot be peremptorily stated that *Kompetenz-Kompetenz* unequivocally lies with the ECJ.

4. Finding Common Ground: What Model for Understanding Sovereignty in the EU?

Given the variety of approaches to the question of the role of sovereignty in the EU constitutional system analyzed above it is no easy matter to identify a common framework that could guide the endeavours of both lawyers and political scientists. Nevertheless, it is possible to sketch three models for understanding sovereignty that can span the disciplinary boundary: Westphalian, post-sovereign and confederal models of sovereignty.

The Westphalian understanding of sovereignty as the indubitable property of member states and unaffected by the process of treaty-based European integration is more appealing to scholars of

international relations than to international lawyers. Yet however marginal this perspective may be amongst contemporary legal scholars, it remains a plausible claim for making sense of an EU where exit is possible and treaty revision still requires unanimity amongst member states. It is precisely these features that are interpreted as analogous to the whole gamut of international law obligations – the UN, Geneva Conventions etc – and which do not give rise to such jeremiads about lost sovereignty as the EU does. Of course, such a position can be adopted only at the cost of neglecting developments including the constitutionalization of the treaties by the ECJ and the debates over *Kompetenz-Kompetenz* arising from the creation of the pillar system.

A second possible approach that can find support among lawyers and political scientists alike involves cutting through the Gordian knot of sovereignty. Instead of assuming that a constitutional system is predicated on a successful sovereignty claim, the notion of post-sovereignty posits that locating ultimate political authority in the EU is futile. Rather, as MacCormick (1999: 126) provocatively put it, state sovereignty is like virginity: 'something that can be lost without another's gaining it'. This notion of sovereignty goes against the very grain of the zero-sum assumption that if sovereignty can no longer be said to belong to the nation-state then it must be located at the EU level.

The discourse of post-sovereignty is intended precisely as a way out of the impasse arising from Kelsen's constitutional *Grundnorm*, which assumes that any constitutional system requires an ultimate source of authority or *Kompetenz-Kompetenz*. This, as MacCormick and others recognised, was always an heroic assumption in the EU given the absence of a constitutional moment that could legitimate a *Grundnorm* – a feature further underlined by the fiasco of the Constitutional Treaty. Lawyers, however, are not alone in thinking that the existence of the EU suggests there is no necessary link between a successful constitutional system and the existence

of a pristine, hierarchical model of Westphalian internal and external sovereignty. Political science has also adopted the language of post-sovereignty. Hence William Wallace (1999, 506) has no problems in describing the EU system as 'resting upon a shared discourse, which the participants prefer to understand from different perspectives, and which they interpret in different ways to different audiences.' It is precisely this post-sovereign assumption that has spawned the whole sub-discipline of multi-level governance (Marks and Hooghe, 2001) concerned with untangling and explaining the intricate web of policy networks in which the notion of sovereignty is largely irrelevant. But if this were true it would require another explanation for opting out, non-membership and the vicissitudes of treaty revision that so far has not been forthcoming.

There is also a third model for conceptualising sovereignty that can provide for common ground between legal scholars and political scientists. This model can be referred to as a confederal conception of sovereignty in the idiom of political science, or as constitutional pluralism using the lexicon of law. In either case this approach to sovereignty is based on accepting not the absence or irrelevance of sovereignty claims, as with post-sovereignty, but their multiplicity. In this sense there is a 'sovereignty surplus' (Walker, 2007) that has to be understood and managed in both its legal and political consequences. Hence the sovereignty claims of the EU, particularly the ECJ as interpreter of the treaties, are juxtaposed with those of the member states.

As a result, lawyers adopting this notion of sovereignty have identified 'constitutional tolerance' (Weiler, 1999) or 'constitutionalism pluralism' (Walker, 2002) as the principle for resolving clashing sovereignty claims. The kernel of such a doctrine is mutual acceptance of the right to make such claims as a starting point for accommodation between institutions, especially courts. Indeed, this very principle of constitutionalism pluralism has been likened to the separation of powers

understood as a republican mechanism for ensuring freedom through non-dependence (Maduro, 2003a; cf. Bellamy, 2007). *Pace* Kelsen's model of law, constitutional pluralism does not consider it right – either normatively or factually – for the EU's chief court to exercise *Kompetenz-Kompetenz*.

The same emphasis on the need for accommodating plural sovereignty claims can also be found in political science, albeit with the explanation that such claims arise from the EU's plurality of peoples rather than a multiplicity of constitutional traditions. It is precisely this concept of sovereignty that lies behind Abromeit's (1998), Nicolaidis' (2004) and Chopin's (2002) call to rethink the supposed federal nature of EU. Instead of imagining there to be a single constitutional system hierarchically overseen by the ECJ, they advocate recognising the multiple sites of popular sovereignty in the EU in order to incorporate them into the political architecture. Thus rather than positing the existing of a single sovereign European people these political scientists have a confederal understanding of the EU as founded on multiple sovereign peoples. However, as with constitutional pluralism, the explanation for how decision-making institutions can be reconciled best with such a conception of sovereignty remains open to question.

5. Conclusions

Of all three models of sovereignty presented in the previous section it appears that the confederal/constitutional pluralism model is perhaps the one that can best engender constructive interaction between law and political science. This is not only because it enables sovereignty to be properly problematised in the EU constitutional system by avoiding the glib certainty that sovereignty claims are not relevant to a constitutional system either lacking sovereignty (the Westphalian model) or having blithely moved beyond them (post-sovereignty). In addition, the

acknowledgment of multiple and clashing claims to sovereignty allows for a better focus on the institutions (courts as well as representative institutions) espousing such claims and the principles on which they are based (constitutional norms and popular sovereignty).

Yet at the same time this paradigm of sovereignty also underscores the extent to which more interaction between the two disciplines is necessary. As demonstrated in section three, the very problem of locating *Kompetenz-Kompetenz* has still to be tackled in a coherent interdisciplinary manner. Of course, this is partly a consequence of the pillar structure. However, given the Janus-faced nature of sovereignty described in section one it seems odd that the study of the interaction between law and politics in the EU constitutional system has not been able to contributed much to the discussion of the ontology of sovereignty in Europe. It is precisely to address this gap in our knowledge that a broader conception of sovereignty – one that can allow the same theoretical and empirical puzzles to be studied from a dual legal and political perspective – needs to be employed in EU studies.

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