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https://doi.org/10.55194/GI.2023.5-6.1

What does 'European Sovereignty' mean?

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Abstract

Since some time the call for a "European sovereignty" has gained momentum. Especially the French President Macron has strongly pleaded in its favour. According to him Europe should shape its own destiny; it should adopt "the role of a rule-maker, not a rule-taker". However, any strengthening of the EU's role, be it in the field of economy, social affairs or geopolitics, presupposes the conferral of new competencies on the Union including a decisive answer to the question who, a European organ (European Court of Jurisprudence) or the relevant organ of the member State (e.g., Constitutional Court) should have the final say regarding competence conflicts. The issue is discussed taking into account the jurisprudence of the German Federal Constitutional Court and the recent reactions of the European Court of Justice through its judgments in Hungarian, Polish and Rumanian cases. In conclusion it is argued that "European sovereignty" is a political term not being helpful to solve legal problems.

Keywords: sovereignty, constitutional identity, ultra vires review, European Court of Justice, national constitutional courts

1. Introduction: Sovereignty

"Sovereignty" – Martti Koskenniemi has said – "is one of international law's large words and a persistent source of anxiety for the field."[1] It is a word of glory indicating supreme power and a word of fright indicating nationalism and selfishness as pernicious elements for the international legal order created in 1945 to establish and maintain peace and to protect human rights and global cooperation. This has led international lawyers to postulate that the whole concept of sovereignty should be reconsidered,[2] and the late Louis

1 Koskenniemi, Martti: The many faces of sovereignty. Introduction to critical legal thinking. *Kutafin University Law Review,* 2017, 4(2), 282, 283.

2 Dzehtsiarou, Kanstantsin: Can Human Rights Law Live Up to its Promises. *European Human Rights Law Review*, 2022/1, 1–7.

Henkin, a renowned human rights lawyer, used to contemptuously speak of sovereignty as the "s-word".[3] Actually, one has made "a moral case" against sovereignty.[4] While it is true that more than once States have wrongly invoked the sovereignty argument for opposing international decisions by describing them as intervening in matters being essentially within their domestic jurisdiction, States' sovereignty will remain an unavoidable and not renounceable cornerstone of international law. Sovereignty meaning authority over persons and territory is necessary for delimiting the spheres of power and responsibility of the States, it is an indispensable element of order in international law. It is for this reason that all relevant international documents starting with the UN Charter insist on the sovereign equality of States.[5]

As many legal terms sovereignty has changed with regard to its substance and holders. While in earlier times the prince or king was understood as the holder of the territorial sovereignty, today it is the State itself having acquired its own personality as original subject of public international law. Under the aspect of legitimacy, today the peoples are the acknowledged bearers of sovereignty equipped with the right to self-determination. As to the substance of sovereignty it has never been absolute, not even when Jean Bodin wrote his work on "Les six livres de la république" (1576) and of course not in our days since the State has lost the right to use military force for the achievement of its own interests (jus in bellum) and has to respect human rights.[6] The meaning of sovereignty was never clearly outlined but has ever reflected the altering inter-State relations and the evolution of public international law in general. A permanent part of sovereignty, however, was and is that it relates to the original subjectivity or personality of international law meaning that its bearer has immediate access to all the rights and obligations set out by international law without any intermediary, and that it may pursue its objects and purposes unhindered and freely within the limits of international law.[7] For these reasons sovereignty was always firmly connected with statehood. Sovereignty had never been claimed for

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3 In personal exchange with the author.

4 Koskenniemi op. cit. 283.

5 Fassbender, Bardo: *Sovereignty and Constitutionalism in International Law.* In: Walker, Neil (ed.), Sovereignty in Transition. Oxford – Portland Oregon, Hart, 2003, 125 et seq.

6 Cf. Steinberger, Helmut: *Sovereignty.* In: Bernhardt, R. (ed.): Encyclopedia of Public International Law (Volume IV.), Amsterdam, North Holland, 2000, 500, 505, 507, 512 and 518.

7 One of these objects and purposes should certainly be the public welfare of the State's people.

another entity than a State, not even for the United Nations or any other international organization – the European Communities and now the European Union being the only exceptions.

2. European sovereignty

1. Actually, discussions on the sovereignty issue started rather early. I fairly well remember a conference in 1978, which – probably provoked by the imminent first direct election of the European Parliament and the enlargement of the exterior competencies of the European Communities – discussed how the distribution of sovereignty between the Communities and the Member States could be determined.[8] My impression at the time was that the conference participants seriously tried to understand the legal implications of the evolution of the Communities by applying to them a concept very familiar to them as constitutional and international lawyers, namely sovereignty. Evidently, it was then, and probably is even today, too difficult to think of organizations endowed with important powers usually held by States different from or beyond State categories. And, to be sure, such an approach was not remote from the thoughts of the time. Walter Hallstein, the first President of the European Communities Commission, in 1969 had written a book “Der unvollendete Bundesstaat” (The unfinished federal State), clearly taking up the vision of an evolution finally leading to a European federal State.[9] Already the title of the French edition one year later was conceived more carefully (“L’Europe inachevée”), and the English edition issued in 1972 was perhaps still more discreetly titling “Europe in the Making”. The last German edition published in 1974 was just entitled “Die Europäische Gemeinschaft” (The European Community) leaving completely open the finality of the Community. In the meantime and furthered by the accession of many additional States the vision of a federal State has faded away, and also the statement expressed in Art. 1 TEU that this treaty is another step of the realization “of an ever closer Union of the European peoples” does not contain any hint at a certain concept of a completed Europe.[10] From this point of view the ex-

8 For the conference see Ress, G. (ed.): *Souveränitätsverständnis in den Europäischen Gemeinschaften*. Baden-Baden, Nomos, 1980, 1–226.

9 See also the Italian edition “Europa, Federazione incompiuta” (1971).

10 Cf. also Preamble TEUF and Preamble Charter of Fundamental Rights of the EU; see further Weber, Ruth: European Integration through the Eyes of its Treaties’ Preambles. *Zeitschrift für europarechtliche Studien*, 2023, 26(1), 111 et seq.

tension of the sovereignty terminology beyond States does not seem much promising, still more since all Member States agree that the Union is not a State and will not become in the foreseeable future.

2. However, apart from general academic deliberations, recent remarks of high-level politicians have renewed debates about "European sovereignty".[11] The best known examples can be found in speeches made by the French President Emmanuel Macron and the former President of the European Commission Jean-Claude Juncker. Macron in 2018 pleaded to "build a new European sovereignty" in order to "provide a clear and firm response to our fellow citizens that [...] we can protect them and provide a response to this global disorder." And he continued: "To defend the European idea is not to defend an abstract idea, some sort of dilution of our own individual sovereignty, but it is to act in the faith that faced with such great global changes, such large-scale transformations [...], we need a sovereignty which is stronger than our own, which works alongside our own and does not replace it, as only this sovereignty can provide the right answers to large-scale migration, global insecurity and economic, social and environmental transformations." Juncker for his part just a little later in 2018 argued that "(T)he geopolitical situation makes this European hour: the time for European sovereignty has come." And he added in the same line as Macron: "European sovereignty is born of Member States' national sovereignty and does not replace it." This wording reminds of the European citizenship concept (Art. 20 para. 1 cl. 3 TEUF) according to which European citizenship is arching the single nationalities but is not replacing them and draws some specific consequences from this construction, namely particular rights for the European citizens (Arts 21 to 25 TEUF). If we try to transfer this idea to the European sovereignty, i.e. that European sovereignty is vaulting over the single national sovereignties and specific consequences are following from this construction, then we have to know what these consequences are or should be. Probably Macron and Juncker want to say that the European States can withstand the challenges posed to them on the geopolitical plane only by acting together through the European Union and not acting merely by themselves. If we unclothe the call for (more) European sovereignty of its political emphasis it boils down to the pure claim for more powers or competencies for the Union, a process quite common in the history of the Community and Union that had happened before by any amendment of the treaties or their replacement by new treaties. But

11 See for the quotations Szewczyk, Bart M. J.: *European Sovereignty, Legitimacy, and Power.* London–New York, Routledge, 2021, 1–2. at footnotes 1,2, 5 and 9.

now, the strong insistence on the term "sovereignty", sometimes qualified by the attribute "strategic",[12] seems to grasp a bit further than just to add to the existing competencies some new ones, even if they are of particular importance. Already before, essential powers had been transferred to the Union, just think of the establishment of the common monetary policy, but never before a transfer of power was so closely connected with the call for European sovereignty. So what could this special political activity mean?

Perhaps a speech of President Macron (11 April 2023) in The Hague may shed some light on this issue. As far as I can see Macron tries to combine two ideas under the arch of European identity and independence. The first one concerns the strengthening of the European economic potential by creating jobs, financing the social model and dealing with climate change. The second idea is that the Europe of today is too dependent on other world powers placing Europe in a position of not being able to decide for itself. Therefore, Europe should become a third pole between the USA and China. European sovereignty should mean that the continent may "choose our partners and shape our destiny" rather than being "a mere witness (to) the dramatic evolution of this world". Macron demands for Europe the role of a "rule-maker" not a "rule-taker".[13]

Macron's thoughts are certainly worth to be reflected upon, already for the reason because only very few politicians take the pain to seriously consider the problem. Personally I agree with the call for strengthening Europe's role in world politics, but this requires that the voice of Europe is more uniform than it often is. And I do not agree as far as Macron thinks that Europe should try to overcome the challenges in a position of equal distance between China and the USA. Rather I would argue that Europe dearly needs the alliance with the USA in many respects and any estrangement from the USA now and for the foreseeable future would be disastrous. This does not mean that Europe should not do its best to get stronger, not only but also regarding its military potential, though just in this respect it will take decades until Europe will be self-standing. However, all these discussions are of a political nature. The term sovereignty is used in a political way which is hardly overlapping with the

12 Lührs, Lisa-Marie: Europäische Souveränität als mehrdimensionaler Rechtsbegriff. *Europarecht*, 2022, 57(6), 673, 677. The same notion is also used in the agreement of the so-called German „ Ampel"-coalition (7 December 2021) sub "Europa", 131–132.: „strategisch souveränere Europäische Union"; „strategische Souveränität Europas".

13 The quotations are taken from Internet https://www.france24.com/en/europe/20230411-president-macron-to-visit-netherlands, last visited 19 May 2023.

international legal terminology. Even if we agree that Europe should become stronger the sole legal way to achieve this aim is the conferral of additional competencies on the EU. Therefore, let us go back to legal arguments.

Any amendment to the EU treaties would require a certain procedure contained in Art. 48 TEU. Does the call for sovereignty mean that the Union, at least on the foreign policy field, should be liberated by treaty amendment from the shackles of the principle of conferral as expressed by Art. 5 TEU according to which the Union shall act only within the limits of the competencies conferred upon it by the Member States in the treaties to attain the objectives set out there? This would mean that the Union could act independently of the Member States and define its own ends and take all the necessary measures. Such an absolute separation from the will of its Members would promote the Union to the rank of a completely independent actor on the international scene leaving the Member States powerless if they are not prepared to withdraw from the treaty and terminate their membership (Art. 50 TEU). As we have seen no Member State is favouring such a development, we cannot assume that this is meant by the sovereignty argument of Macron and Juncker, who both steadily affirm the remaining sovereignty of the Member States.

Another interpretation might be possible. One could think of a strengthening of the Union's freedom of action by an amendment to the rules on qualified majority vote of the Council (Art. 16 TEU), either by the increase of cases to which this procedure should be applied or by the increase of the necessary number of a blocking minority.[14] Both changes could be achieved by an always possible treaty amendment that would probably have to be accompanied by more intensive thoughts on the invigoration of the Union's democratic legitimacy. However, I am not aware that relevant discussions on European sovereignty have already taken up those proposals. But what would such a development actually say about a possible shift of sovereignty from the Member States to the Union and, particularly, what real consequences could flow from such a statement? One has made assertions about a divided sovereignty commonly exercised by the Union and the States,[15] but what would this tell us about the factual distribution of power between them? Instead of counting the Union's competencies which must always find their basis in the treaties and weighing and comparing them with the remaining competencies of the Member States it might be more productive to look at

14 See Szewczyk op. cit. XII. und 16 et seq.

15 Lührs op. cit. 686 et seq.

the point where disputes on competencies have to be finally decided. It is the old question of "quis iudicabit?" Perhaps we can get from this point of view a better insight into the sovereignty question.

3. Who has the final say?

According to Art.19 TEU the Court of Justice of the European Union shall ensure that in the interpretation and application of the Treaties the law is observed. However, a problem may arise if a national constitutional court does not follow the European Court's interpretation.

Lately, such a conflict, formerly a more theoretical problem, has actually arisen when the German Federal Constitutional Court had rendered its judgment in the Public Sector Purchase Programme case on 5 May 2020.[16] The Constitutional Court did not agree with the European Court's interpretation that the provisions of the Programme and their application were in conformity with the primary European law (treaties), rather they and accordingly also the judgment of the European Court itself were not based on the conferred competencies, i.e. ultra vires acts.[17] They must therefore not be applied within Germany.

Before tackling the evident problem raised by the said judgment let me briefly outline the following. The German Federal Constitutional Court always assures to respect the supremacy of the European law even over constitutional law, but maintains for reasons of democratic legitimacy its power to review the European acts in two constellations, namely the constitutional identity control and the ultra vires control procedure.[18] The identity control may be applied by the Constitutional Court if a legally transferred competence is interpreted and used by the European organs in such a way that its application affects areas of competence that cannot even by constitutional amendment be conferred to the Union. The scope of "constitutional" identity is not easily to define, but it is neither identical with the "national identity" which the Union has to respect according to Art. 4 para. 2 TEU, nor it is identical with

16 Official collection of decisions of the German Federal Constitutional Court BVerfGE 154, 17.

17 Especially, the Constitutional Court held that the principle of proportionality was not respected by the interpretation of the European Court.

18 Masing, Johannes: *Verfassung im internationalen Mehrebenensystem*. In: M. Herdegen – J. Masing – R. Poscher – K. F. Gärditz (eds.): Handbuch des Verfassungsrechts. Darstellung in transnationaler Perspektive. München, Beck, 2021, § 2 MN 2, 28 et seq., 38 et seq.

the extremely large definition in the Constitutional Court's judgment in the Lissabon case (2009).[19] Rather its scope should be restricted to the essentials prescribed in Art. 79 para. 3 combined with Arts 1 and 20 Basic Law (BL), so-called eternity clause, and to the preservation of statehood. Consequently, only a new constitution created according to Art. 146 BL could open the way to Germany's accession to a European State.

The ultra vires review comes into play if the competence used by the European organs, including the Court, is applied by them in a way that contradicts according to the assessment of the national court the object and purpose of the transferred competencies and violates the principle of conferral as provided in Art. 5 para. 1 TEU. The above mentioned Public Sector Purchase Programme case is the eminent and until now sole German example. The German Court is aware of the dilemma created by its jurisprudence. Under the aspect of its obligation to respect European law (Europarechtsfreundlichkeit) it concedes a certain degree of error to the European Court and reduces its review capacity to cases where the interpretation of the treaties by the European Court is "not comprehensible and must thus be considered arbitrary from an objective perspective",[20] a perspective taken of course by the Constitutional Court. The possibility that the Constitutional Court itself may be mistaken is not taken into account.

What is the argument on which the Constitutional Court is founding its competence to overcome the interpretative power of the European Court so clearly expressed in Art. 19 TEU and Art. 267 TEUF? The Constitutional Court argues that the Union can make use only of those powers which are conferred on it by the EU treaties consented by the Member States' ratification laws. Interpretive extensions of the Union's competencies by the European Court would not be covered by the German ratification statute which closely mirrors the European integration agenda (Integrationsprogramm) and which must permanently be protected by the German constitutional organs ("lasting responsibility with regard to European integration, Integrationsverantwortung").[21] The "Integrationsprogramm" or European integration agenda as reflected in the German ratification statute and inter-

19 BVerfGE 123, 267, 359 et seq.

20 BVerfGE 154, 17, headnote 2., more detailed MN 110 et seq. See also a former judgment of 6 July 2010, BVerfGE 126, 286. Approvingly Hillgruber, Christian: Vom souveränen Nationalstaat zur souveränen Europäischen Union? – Souveränitätsverlagerung durch supranationale Rechtsprechung. *Juristenzeitung*, 2022, 77(12), 584 et seq.

21 BVerfGE 154, 17 MN 108.

preted by the German Constitutional Court creates the possibility to deny the applicability of the European act as to Germany. In a recent article a former Judge of the Federal Constitutional Court even went a step further and has not only denied the applicability of the European act but also its validity and still more: it would be no law at all ("Nichtrecht").[22] It is difficult to understand this statement when other Member States have no problems with the European act and respect it as existing and valid law. Also the Federal Government and Diet did not share the Constitutional Court's opinion, but they were constitutionally bound by its decision, and were likewise bound by the European Treaties; they had therefore to respond to the European Commission in a procedure initiated against Germany according to Art. 258 TEUF. In view of this challenge, for some German constitutional lawyers the world nearly collapsed, and according to their view the European integration stood at the brink of disaster. However, the Commission would have failed its task to protect the treaty if it had not acted in this way.

The European Court of Justice for its part reacted by its own tools to the denial of constitutional courts, by no means merely of the German Court, to accept the supremacy of the European law and the binding force of its decisions. Three judgments of 16 and 22 February 2022 are of particular interest. The first two cases concern legal actions of Hungary and Poland for annulment of the EU Regulation 2020/2092 and were directed against the European Parliament and the Council.[23] The Regulation (Art. 1) provides the necessary rules in order to protect the EU budget in case of a violation of the principles of the rule of law (état de droit, Rechtsstaat) in a Member State. Does the EU have such a protective competence? The European Court answered the question in the affirmative and dismissed the actions.

There are two lines of argument in the judgments. First, the rule of law is according to Art. 2 TEU a value not of the Member States or the Union alone, but is common to the Member States and Union together. States have to respect the rule of law as a prerequisite of their accession to the Union (Art. 49 TEU) and have continuously to respect it after accession under Art. 2 TEU. Thus, the rule of law has become an essential element of the identity of the

22 Kirchhof, Paul: Vorrang des Rechts. Zu den Grenzen eines Anwendungsvorrangs von Europarecht. *Neue Juristische Wochenschrift,* 2022, 75(15), 1049, 1054.

23 ECJ, ECLI:EU:C:2022:97, C-156/21; ECJ, ECLI:EU:C:2022:98, C-157/21. To the following the excellent article of Gaudin, Hélène: Ce que l'Union européenne signifie: l'identité de l'Union et de ses États members. *Revue trimestrielle des droits de l'Homme,* 2023, (34), 15 et seq.

Union.[24] Second, the competence bestowed on the Union by the Regulation must have been legally conferred on it. The legal basis of the Regulation is found in Art. 322 para. 1 (a) TEUF. The consequences drawn from the application of the Regulation must not, however, disregard Art. 7 TEU, which expressly regulates the sanctions in case of a "serious and persistent breach by a Member State of the values referred to in Article 2..." The Court therefore was cautious to qualify the measures based on the Regulation not being sanctions imposed for a violation of the rule of law, rather it defined them to be solely protective measures for the EU budget, the basis of all tasks of the EU and expression of the solidarity among the Union and the member States; the link between the budget and the defence of the rule of law must always be clearly established. The Court further required the Commission to strictly observe the relevant procedural rules and the principle of proportionality.

The third judgment of the European Court of Justice issued only six days later concerns the jurisprudence of the Romanian Constitutional Court (Curtea Constituţională) with regard to the binding effect of its judgments relating to the primacy of European law.[25] An ordinary court that wished to examine the establishment of a Rumanian special unit charged with investigations against judges and prosecutors by the yardstick of European law although the Curtea had already decided that the establishment fulfils all prerequisites of constitutional and European law, turned to the European Court asking for a preliminary ruling. Responding to this question the European Court stated that it would violate Arts 19 and 4 TEU and Art. 267 TEUF to prohibiting the ordinary court to ask the European Court for a preliminary ruling even if the Constitutional Court had already decided the case. The European Court recognizes that the arrangement of the relations between the Constitutional Court and ordinary courts belongs to the competence of the Member State, and the State therefore may also determine a legally binding effect of the judgments of its Constitutional Court – but only on three conditions. First, the independence of the Constitutional Court must be guaranteed. Otherwise the Arts 19 and 2 TEU would impede the binding effect. Second, the binding effect cannot reduce the competence of ordinary courts to examine

24 This relates also to the other values enumerated in Art. 2 TEU, and should also be valid for the constitutional identity of the Member States. Already on 7 October 20212 the Polish Constitutional Court had declared unconstitutional several articles of the Regulation; see Gaudin op. cit. 31.

25 ECJ, ECLI:EU:C:2022:99, C-430/21). To the following the very good article of Spieker, Luke Dimitrios: Werte, Vorrang, Identität: Der Dreiklang europäischer Justizkonflikte vor dem EuGH. *Europäische Zeitschrift für Wirtschaftsrecht*, 2022, 33, 305–313.

the compatibility of national with European law. The European Court agrees that only directly applicable European law has primacy over national law, but Arts 19 TEU and Art. 267 TEUF are such immediately applicable provisions. Third, the judgments of constitutional courts cannot claim legally binding effect if they disregard judgments of the European Court even if they invoke for this purpose the constitutional identity.[26] Therefore a constitutional court cannot exclude the application of a European secondary norm arguing that it would violate the national identity according to Art. 4 para. 2 TEU. By the same token a constitutional court cannot hold that a European legal norm is inapplicable having found this result on the basis of its own interpretation of this norm. Accordingly, in such cases the judgments of constitutional courts cannot have binding effect for ordinary courts.

These decisions of the European Court of Justice did not come unexpected, since the number of resistant constitutional courts is growing and the legal unity, the founding idea of the Union is at stake. The Court had to react in this determined way. But this ping-pong play is dangerous. The European Court bindingly decides a case, the constitutional court on the basis of the constitutional identity or ultra vires argument uses the binding force of its judgments to impede the internal application of the norm explicitly confirmed by the European Court which on its part denies the admissibility of prohibitive orders of the constitutional court to ask again for a preliminary ruling and to invoke national identity or ultra vires assertions against its judgments. All this is confusing and the outlook not promising. Still an escape from this imbroglio is necessary.

Personally, I do not find the ultra vires argument convincing.[27] Too evidently Arts 19 TEU and 267 TEUF are ruling the issue. Very deliberately the States have charged the European Court with the power to finally interpret the European law. If the European Court of Justice has held that an act of the EU is valid under European Law such an act must be considered as taking precedence over national law. Certainly, the European Court may go too far, may misunderstand the legal provision concerned, but erring is human and no judge, national or European, is exempt from it. The only exception should be recognized if the ultra vires argument conflates with the invocation of a violation of the constitutional identity, because in this constellation the legal construction of the European Court in the Rumanian case is not persuasive. The interpretation

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26 Cf. Benda Ernst – Klein, Eckart: *Verfassungsprozessrecht (4th ed.).* Heidelberg, C.F. Müller 672 MN 1530, 2020.

27 Differently Hillgruber op. cit. 587 et seq.

of the constitutional limits drawn to the possibilities of a State to integrate into another entity must remain with the competent State organ, probably the constitutional court. Of course these limits must be determined by the constitution itself and must not be interpreted arbitrarily broad.

Perhaps one might come closer to a solution if one tries to include the characterization of the European Union by the German Federal Constitutional Court in the discussion. According to this Court the EU is a „ Staaten-, Verfassungs-, Verwaltungs- und Rechtsprechungsverbund“,[28] not well translated into English as "the Union is based on the multi-level cooperation of sovereign states, constitutions, administrations and courts". This translation completely fails to transport the idea of a community of interests, solidarity and joint responsibility which is inherent in the term "Verbund", even if the term does not clearly indicates the degree of common interest, solidarity and responsibility. Also immanent is the notion of coherence and holding together and the search for finding a compromise requiring a reduction of confrontational attitudes. Some legal techniques might be helpful, e.g.: a repeated exchange of arguments through the instrument of preliminary rulings. Another way could be the quest for latitudes of European legal terms. Some terms have a national and a European impress. An example is the notion "national identity" in Art. 4 § 2 cl. 1 TEU. It certainly primarily relates to the Member States concerned, but contains also a legal obligation for the Union to respect the identity, a situation that speaks in favour of the priority of the national interpretation. On the other hand, States must not use the "national identity" argument to impose any obligation whatsoever on the Union. A solution could be that in this case the Union, finally the European Court of Justice, had to explain in great detail why it could not follow the argument of the State. If the State has maintained that the constitutional identity (Art. 79 § 3 BL) would be violated, the burden of argument would rest still more on the Union; only evident misuse by the State could justify to disregard the State's objection.[29] Concerning this point I would therefore not be able to follow the judgment of the European Court in the Rumanian Case.

28 BVerfGE 154, 17 MN 111.; 140, 317 MN 44; the English translation by the Federal Constitutional Court. More to this in my contribution to the forthcoming Festschrift für Rudolf Streinz (2023).

29 Cf. Krüger Herbert: Über die Herkunft der Gewalt der Staaten und der sog. supranationalen Organisationen. *Die öffentliche Verwaltung*, 1959, 721, 725.; also Herdegen, Matthias: *Außen- und Wehrverfassung*. In: M. Herdegen – J. Masing – R. Poscher – K. F. Gärditz (eds.): Handbuch des Verfassungsrechts. Darstellung in transnationaler Perspektive. München, Beck, 2021, § 27 MN 36.

The assertion of an ultra vires act of the EU by a Member State is another case. As the disputed competence as such is undoubtedly a competence of the EU, it is primarily up to the Union to interpret it. On the other hand it is up to the Member State to demonstrate that the Union has acted outside the "Integrationsprogramm" (European integration agenda) as defined by the EU Treaties. But this mistake cannot be proved solely by reference to the own national ratification law (Zustimmungsgesetz) and its interpretation by the relevant national court alone. Rather the national court should try to collect the opinions of the other Member States about the content of the integration agenda. Only all Members together are the "Master of the Treaties", never one State alone. If the States do not agree it becomes quite evident why the European Court of Justice has and must have the final say.

4. Conclusions

What does flow from these deliberations for the issue of "European sovereignty"? We have seen that for quite obvious reasons – the unity of EU law – the European Court has the final say, and only in some rare cases the national constitutional court. Does this result permit to attribute sovereignty to the European Union? In an interesting contribution to a book entitled "Sovereignty in Transition" the author has opined that the generally accepted supremacy of EU law cannot be equated with sovereignty, but that sovereignty is the basis of the supremacy claim.[30] I think this is a precipitate conclusion, because no Member State has ever transferred sovereignty to the EU, rather sovereign rights (being the official English translation of "Hoheitsrechte" in Art. 23 para. 1 cl. 2, Art. 24 para. 1 BL), i.e. competencies usually exercised by a State. The compliance of Member States with legal acts of the EU, be it regulations or court decisions, based upon such conferral by international treaties has nothing to do with acquisition of sovereignty by the Union.

Still the problem exists how to comprehend the fact of an unprecedented accumulation of competencies by the EU? There is evidently some kind of embarrassment among lawyers. They have problems to disengage themselves from well known legal categories as sovereignty. In order to save their concept they extend the notion, speaking, e.g., of "late sovereignty", well

30 de Búrca, Gráine: *Sovereignty and the Supremacy Doctrine of the European Court of Justice*. In: Walker, Neil (ed.), Sovereignty in Transition. Oxford – Portland Oregon, Hart, 2003, 449, 454, 459 et seq.

recognizing that sovereignty as such does not fit.[31] In order to grasp what the Union is we can neither overlook its dependency on the founding treaties which always can be collectively modified by the members (Art. 48 TEU),[32] nor the right of any individual member to leave the Union (Art. 50 TEU). On the other hand, the Member States gain new legal influence through the obligatory and reciprocal recognition of their rules by other members, and the compensation of the loss of sovereign rights by conferral through their participation in the work of the Union organs.[33] This difficult structure needs a new terminology. One should not pour new wine in old bottles. With regard to the European Union we should, as lawyers, abandon the term sovereignty at all and still speak of its competencies, supremacy of its law, and its authority.[34] We should let the European sovereignty terminology rest with the politicians.[35] It does not help in the legal discussion.

31 Walker, Neil: *Late Sovereignty in the European Union*. In: Walker, Neil (ed.): Sovereignty in Transition. Oxford – Portland Oregon, Hart, 2003, 3, 18 et seq.

32 Steinberger, Helmut: *Der Verfassungsstaat als Glied einer europäischen Gemeinschaft.* In 50 Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer (VVDStRL) 9, 18 (1991): a formal treaty amendment is necessary, only a common resolution of the Member States does not suffice.

33 See Fassbender op. cit. 133.; Herdegen, Matthias: *Das Grundgesetz im Gefüge des westlichen Konstitutionalismus*. In: M. Herdegen – J. Masing – R. Poscher – K. F. Gärditz (eds.): Handbuch des Verfassungsrechts. Darstellung in transnationaler Perspektive. München, Beck, 2021, § 1 MN 96; Masing, Johannes: *Verfassung im internationalen Mehrebenensystem*. In: M. Herdegen – J. Masing – R. Poscher – K. F. Gärditz (eds.): Handbuch des Verfassungsrechts. Darstellung in transnationaler Perspektive. München, Beck, 2021, § 2 MN 99 and 100.

34 Kirchmair, Lando: Europäische Souveränität? Zur Autonomie des Unionsrechts im Verhältnis zum Völkerrecht sowie den Mitgliedstaaten am Beispiel der Corona-Krise, in Euruparecht, 2021, 56(1), 28, 39 with footnote 52.

35 Cf. Jakab, András: *European Constitutional Language*. Cambridge, Cambridge University Press, 2016, 116.: advice not to answer the question of sovereignty in the EU, because this would enhance the possibility of conflicts between the Union and the Members instead to prevent them. The final say would anyway lie with the politicians and not the lawyers.