# CHAPTER 4

# *Sovereignty in Conflict*

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> A different view would be that sovereignty and sovereign states, and the inexorable linkage of law with sovereignty and the state, have been but the passing phenomena of a few centuries, that their passing is by no means regrettable, and that current developments in Europe exhibit the possibility of going beyond all that. On this view, our passing beyond the sovereign state is to be considered a good thing, an entirely welcome development in the history of legal and political ideas.[1]

## I. INTRODUCTION

It is with this passage that Neil MacCormick started his now famous 1992 Chorley Lecture which was later published under the title *Beyond the Sovereign State*. He was then one of the first Anglo-American legal philosophers to analyse the legal and political nature of the European Union (EU) and to venture the possibility of doing so without the concept of legal and political sovereignty altogether. His concept of post-sovereignty has gradually become very influential in Europe[2] and has recently led many authors to compete in finding the right vocabulary to pinpoint the very specificity of the shift in sovereignty which has characterized European politics over the years.[3] Sovereignty is clearly *en vogue* and even more so since constitu-

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[1] MacCormick, 1993, 1.

[2] See MacCormick, 1995a, 1995b, 1996, 1997, 1998, and 1999. See also most recently, Kostakopoulou, 2002, 147. See also among others, Bankowski, 1977; Weiler, 1991; Bellamy and Castiglione, 1997; Eleftheriadis, 1996 and 1998; Bankowski and Christodoulidis, 2000; Douglas-Scott, 2002.

[3] See Magnette, 2000 on 'cooperative sovereignty'; Kostakopoulou, 2002 on 'floating sovereignty'; Walker, 2003a on 'late sovereignty'; Maduro, 2003 on 'contrapunctual sover-

tional talk has made its way to the European front stage, thus raising the spectre of European unitary sovereignty, on the one hand, and hence of renewed threats to national sovereignty, on the other. In fact, never has sovereignty been as fashionable as since its explanatory and normative force first came into doubt and its knell was tolled in the European Union. What makes sovereignty such a contestable concept is its very paradox: the high degree and diversity of criticism raised against state sovereignty for the past fifty years both in practice and theory, on the one hand, and its remarkable resilience in post-national[4] political debate and legal discourse, on the other. As Neil Walker rightly observes in his recent book *Sovereignty in Transition*, 'the idea of sovereignty cannot just be wished away. [...] It is the very challenge to the old order that demands such urgent re-examination of the building blocks of that order'.[5]

This concern for the future of sovereignty is not new, however, and goes beyond the question of the political nature of the European Union.[6] For a long time the concept or principle[7] of (State) sovereignty was regarded as the cornerstone of both national and international political and legal organization, on the one hand, and of modern political thought, on the other;[8] it was the State's normal condition[9] to be the *supreme power* or *ultimate authority* in political and legal matters, whether internally or externally. The precursor of the current 'international community'[10] resembled a 'society' of equal and independent states sovereign both on the outside and the inside.[11] In fact, not only was sovereignty regarded as a norm, but its content itself was perceived as self-evident and applicable to all matters of daily governance.[12] Of course, sovereignty has

eignty'; Bellamy, 2003 on 'mixed sovereignty'; Besson, 2003a and 2003b on 'cooperative sovereignty'; Besson, 2005a on 'tamed sovereignty'.

[4] I hereby refer to the term 'post-national' as a generic term to mean non-strictly national or international, whether supra-national or merely post-national. It should not be taken to mean that the post-national supplants and replaces national; it can well coexist with it. See, eg, Curtin, 1997.

[5] Walker, 2003a, vii–viii. See also Bellamy, 2003, 179.

[6] One of the first difficulties one encounters in an article about sovereignty is the choice of the disciplinary field. In this chapter, I have made the choice of a multiplicity of theoretical points of view in order to reveal the complexity and multiple layers in the roots of sovereignty.

[7] The literature on sovereignty refers interchangeably to the 'concept', 'principle' or 'institution' of sovereignty. See, for instance, Thürer, 1999, 38 ff; James, 1999; Sorensen, 1999. In this article, I will refer mainly to the concept of sovereignty that underlies the principle or institution we know, without distinguishing the principle from the institution of sovereignty.

[8] See Jackson, 1999b, 431 who compares sovereignty to 'lego'.

[9] See the expression of Judge Anzilotti in his individual opinion in the case *Régime austro-allemand des douanes* CPIJ Series A and B n° 41 (1931) 57. This expression refers to state sovereignty and not to political sovereignty in general.

[10] See Tomuschat, 1995; Simma and Paulus, 1998 on the notion of international community.

[11] See Jackson, 1999b, 436.

[12] See Miller, 1981, 16: 'Just as we know a camel or a chair when we see one, so we know

always been limited.[13] For a long time, however, these limitations have been regarded as inherent to the concept of sovereignty and as jeopardizing neither its function nor its justification.[14]

Recently, however, sovereignty has been subject to growing challenges both in theory and in practice. Over the last 50 years or so, lawyers, political theorists and specialists of international relations have become more and more divided on the issue of state sovereignty and sovereignty in general. The international community's power has been constantly reinforced to the detriment of State sovereignty; this has happened through power transfers from States to international or supranational organizations such as the EU[15], the development of *ius cogens*[16] and of the international community's 'constitution',[17] the reinforcement of the principle of humanitarian intervention, the emergence of the concept of 'failed state', economic, or legal globalization and, finally, the development of new international and transnational actors such as NGOs or multinational corporations.[18] Conflicts of sovereignty have increased in practice and conflicting claims to ultimate authority on all sorts of matters constitute a permanent feature in the now pervasive regimes of multilevel governance;[19] this is illustrated by the *Kompetenz-Kompetenz* crisis and the recurrence of constitutional conflicts in the EU, ie conflicts of claims over matters falling into the field of ultimate national and European constitutional competence such as fundamental rights or basic principles.[20] Besides these threats on external sovereignty posed by the development of supra-State and post-State political entities, the emergence of infra-State claims to authority has contributed even further to the fragmentation of internal sovereignty.[21]

With this shift in authority away from the State to new sub-State, supra-State, post-State[22] and non-State entities, the question is whether the concept of ultimate authority or sovereignty is to be abandoned or, on the contrary, retained and, if so, in which form. Faced with these changes, most

a sovereign state. It is a political entity which is treated as a sovereign state by other sovereign states.'

[13] See Bodin, 1993, Book I, Chapter VIII, 122–9, 158–61. See also Hobbes, 1999, Ch 30, 231.

[14] See James, 1986, 6–8; Hinsley, 1986, 117–57.

[15] See, eg, Zürn, 2000, 183; Keating, 2002.

[16] See Müller, 1999a, 137–8.

[17] See Thürer, 1999, 51 ff; Thürer, 2000, 597 ff; Tomuschat, 1995, 7; Allot, 1999, 37.

[18] For reasons of clarity, I will limit the scope of this paper to the sovereignty of states and post-national political entities such as the European Union in particular.

[19] See on this concept and for further references, Aalberts, 2004.

[20] See on constitutional conflicts in the EU, Besson, 2003a; Besson, 2004a; Kumm, 1999; Kumm, 2004b; Kumm and Ferreres-Comella, 2004.

[21] See Keating, 2001.

[22] I am using the terms 'post-national', 'post-state' and 'post-statist' interchangeably in this chapter.

authors still regard the state as a central feature of the new national and international order, be it in the context of the conclusion or of the implementation of international law.[23] Some claim, however, that sovereignty has become obsolete in the new post-Westphalian and pluralist constitutional order where different legal orders overlap within the same territory and population,[24] and that it should therefore be abandoned.[25] Although they usually refer to State sovereignty, some extend this verdict to sovereignty in general. Some authors even call for the adoption of new concepts that are more apt to seize the new national and international organization.[26] Others, on the contrary, advocate the concept of sovereignty's continuity and emphasize the central role it continues to play in the current international structure.[27]

This theoretical and practical state of affairs has gradually given rise to a flourishing literature.[28] The issue has not yet been explored from every angle, however.[29] The debate raises interesting questions about the nature of the concept of sovereignty and its relationship to the changing political and legal reality of the State and the international order more generally. Viewed from a wider angle, it is the applicability of statist concepts like sovereignty to the post-national reality which is thrown into doubt and it reveals the necessity to translate those concepts into conceptions that do not constrain this new reality and hence to develop a post-national jurisprudence.[30] In this context, the question this chapter addresses is the following: is it really necessary to choose, as most do, between, on the one hand, rejecting the concept of sovereignty in order to enter the era of post-sovereignty, and, on the other, maintaining it as it is, despite intense changes in the international order? Consequently, the chapter aims at exploring a third way that would allow us to escape from the two types of dualism that

[23] See in particular Walker, 2002, 334; Falk, 1999, ch 2; Koskonniemi, 1991.

[24] See Walker, 2002 and 2003a on constitutional pluralism. See also MacCormick, 1999, 113-121 for the opposition between legal monism (one single legal order that encompasses the national and European legal orders in a hierarchical way) and legal pluralism in the EU (many distinct legal orders that are either radically autonomous or only so under the common umbrella of international law).

[25] See in particular Falk, 1990, 61 ff; Falk, 2001, 791; Keating, 2001; Shue, 1997, 340 ff; Wildhaber, 1996, 37; Reisman, 1990, 869. See also the international case-law and in particular the decision of the International Penal Tribunal for Ex-Yugoslavia Appellate Court in the case *Prosecutor v Dusko Tadic* (2 Oct 1995), (1996) 35 International Legal Materials 32, n 97 which mentions the gradual replacement of the 'state-sovereignty-oriented approach' by a 'human-being-oriented approach'. Contra: Jackson, 1999b, 434.

[26] See in particular Schmitter, 1996a.

[27] See Krasner, 1988; Hobe, 1997; Jackson, 1999b, 434 ff; Virally, 1977, 179.

[28] See eg Hinsley, 1986; James, 1986; Krasner, 1988; Jackson, 1990; Bartelson, 1995. See also the special issue of *Political Studies* 47 and 1999 called 'Sovereignty at the Millennium'. See most recently in the European context, Walker, 2003a. For a review of some essays in the book, see Besson, 2005a.

[29] See the exchange between Falk, 1997 and Jackson, 1997.

[30] See on these issues, Van Roermund, 1997, Walker, 2003b and Shaw and Wiener, 1999.

contrast *State and sovereignty*, first, and *rejecting and saving sovereignty*, second.[31]

The first opposition will not be dealt with in great detail in this chapter—the issues it raises have already been addressed extensively elsewhere.[32] It contrasts abandoning the concept of State in order to save sovereignty in a post-statist world, with abandoning the concept of sovereignty to save post-sovereign States.[33] The idea here is, on the contrary, to consider the capacity of adaptation of both the concepts of sovereignty *and* State.[34] Both may be withheld and remain important in practice. No one can deny that the State remains and should remain one of the key elements of the international order[35] nor that it is necessary to have a sovereign authority to settle conflicts. It is important, however, to realize that both concepts can evolve; this can occur either symmetrically when State and sovereignty are linked, or asymmetrically when they are dissociated as is often the case nowadays—it suffices to look at the Swiss cantons and at the European Union to see that some States are not sovereign and some sovereign authorities are not States.[36]

It is the second opposition between maintaining and rejecting sovereignty that will be addressed in more depth and that will hopefully be overcome.[37] It relies on a far too rigid and static approach to the concept of sovereignty. The choice should not be between retaining the concept in its State-like unitary and absolute conception thus seeking a Kelsenian or Schmittian finalité,[38] and requiring an exclusive choice between national and European claims to sovereignty for instance, on the one hand, and abandoning sovereignty completely, on the other, thus ignoring the epistemic and normative resilience of the concept both in practice and theory.[39] The alternative is not indeed to choose between realizing the tyranny of

[31] See Kostakopoulou, 2002, 137 f.

[32] See on the post-structuralist dimension of the now well-known opposition between sovereignty, on the one hand, and state, on the other: Hoffman, 1997, 53. See also Laski, 1917 and 1941 who defends the idea of a pluralist society without states.

[33] See MacCormick, 1997, 338.

[34] See Thürer, 2001, n 40 ff who speaks of 'Wandel der Staatlichkeit'.

[35] It is important to distinguish between states and nation-states in this context. The weakening of the nation-state does not imply that of the state *tout court* and the same distinction applies to state sovereignty.

[36] Many are those who associate state and sovereignty very closely and hence identify the end or future of state sovereignty with that of sovereignty *tout court*. See eg MacCormick, 1993 and 1999; Wildhaber, 1996, 37 and 46; Hobe, 1997, 147; Thürer, 2001; Aalberts, 2004, 25.

[37] For reasons of space, this chapter will concentrate on the concept of sovereignty and will leave aside the different conceptions and fluctuations of the concept of state. On different accounts of the future of the concept of state in Europe and elsewhere, see in particular Shaw, 1999; Hobe, 1997; Schreuer, 1993; Schmitter, 1996a; Thürer, 2001, n. 40 ff.

[38] See Weatherill, 2002 and Weiler, 2003 for a critique of Europe's pursuit of a formal Constitution.

[39] See Virally, 1977, 195.

statist concepts like sovereignty and rejecting them *en bloc*, on the one hand, and their perpetuation in their rigid statist conceptions without further translation and adaptation to the post-national context, on the other.[40] It should be possible to retain the concept of sovereignty while allowing it to fluctuate along the lines of current changes in the international community and to adapt to the new reality of constitutional pluralism in Europe;[41] it has evolved in this way in the past without ever being rejected for doing so.[42] This built-in flexibility of the concept is even more important as the new international reality has not stabilized yet.[43]

If it is possible to conceive of such a third intermediary approach to sovereignty in a post-national order, how should this new form of sovereignty be conceptualized? Recently, some authors have explored this third path, in the European context in particular,[44] but without yet providing a detailed account of the nature of this new form of sovereignty and of its practical implications. This chapter also aims therefore to develop a more complete account of the complex relationship among sovereign authorities in the same political and legal community. The cornerstone of this account is captured by the idea of *sovereignty in conflict*: rather than understanding constitutional conflicts and other clashes of sovereignty as a problem requiring either a unitary sovereign resolution or the rejection of all sovereign resolutions, the co-existence, competition and mutual adjustment of conflicting claims of sovereignty should be regarded as a normal and desirable political and legal condition. Conflicts over the concept of sovereignty and competing claims to political and legal sovereignty in practice[45] are to be understood as the best way to ensure unity in diversity through a reflexive and cooperative decision-making process in each case.[46]

To address these issues, the chapter's argument is five-pronged. The first section examines the relationship between conceptual analysis and political and legal change II; In the next section, I briefly present the history of contestation of the concept of sovereignty III; The third section addresses the concept of essentially contestable concept IV; In the following section, I argue that the concept of sovereignty is essentially contestable, assess its

[40] On these issues of tyranny and translation of statist concepts in the EU, see Walker, 2003b and Shaw and Wiener, 1999.

[41] See on this notion of 'floating sovereignty', Kostakopoulou, 2002, 138 and Walker, 1991, 448. See also Wildhaber, 1996, 49: '[Sovereignty] is too relative, too fluctuating, to permit very specific deductions.'

[42] See Krasner, 1988 and 1993.

[43] See Kostakopoulou, 2002, 147, 155. See also MacCormick, 1999, 133.

[44] See eg Walker, 2003a; Bellamy, 2003; Maduro, 2003. See for a review, Besson, 2005a.

[45] Conflicting conceptions of sovereignty can be identified with conflicting claims of sovereignty and vice-versa; the latter rely on the former, but it is difficult to think of the former without matching claims of sovereignty in practice.

[46] See Besson, 2005a on the idea of mutual 'taming of sovereignty' through conflict and cooperation.

different dimensions and draw some implications for the concept's centrality in our daily political and legal debates V); Finally, in the last section, I discuss the future of sovereignty in the European Union in the light of the theoretical conclusions of the chapter VI.

## II. REALITY CHANGE AND CONCEPTUAL CONTINUITY

It is important at the opening of the present chapter to start by clarifying the relationship between a political and legal concept like sovereignty and the object to which it refers. Of course, a certain distance between the philosophical analysis of a concept and its legal and political use[47] is unavoidable.[48] This chapter's starting point, however, is to claim that a minimal relationship must be maintained between a concept and its practice, or else political and legal analysis would become void.[49]

Until now, however, political and legal philosophers have not been very clear on what this relationship should be. A majority of authors argue that legal concepts are both descriptive in a first stage and *prescriptive* in a second stage when they constrain reality. Their function is to determine through observation and then to describe what the essential criteria of those concepts are. In the case of sovereignty, for instance, conceptual analysis is about determining the essential qualities of sovereignty by reference to its reality and then to capture them in conceptual criteria.[50] These in turn will entail certain prescriptions about what a sovereign State or a sovereign legal order can be.[51] It remains of course possible to adapt and revise the meaning of concepts whose use fluctuates. Once a concept has been reassessed, however, its function becomes prescriptive again and implies normative constraints on practice.[52] Other authors take a more realistic stance and regard legal concepts as mere reflections and *descriptions* of legal and political reality. Any other approach would amount to a purely metaphysical construction whose validity could not be tested in any objective way. According to legal realists, the task of legal philosophical concepts is to

[47] I will not distinguish between the political and legal uses of the concept of sovereignty which I regard as being the same concept in both fields. Some authors, under a Kelsenian influence, consider erroneously that the legal concept of sovereignty is distinct from the political or moral concept of sovereignty (see Pfersmann 2001, 31). This approach is belied by the legal practice of normative concepts like sovereignty. This distinction should not be confused, however, with the difference between the concepts of political and legal sovereignty; the latter relates to the *object* rather than to the *nature* of the concept.

[48] See Jackson, 1999a, 423 f.

[49] See eg Waldron, 2002, 138 ff on the 'rule of law'.

[50] On criterial semantics, see Raz, 1998 and Dworkin, 2004.

[51] See Pfersmann, 2001, 31 ff; Wildhaber, 1996, 24, 40 and 43.

[52] See Waldron, 2002, 140.

describe those institutions and principles on which positive law and political practice rely effectively.[53]

Neither approach is entirely satisfactory, especially when taken to apply to the concept of sovereignty. Intense recent developments in international and European law reveal the limits of both approaches of political and legal concepts.[54] While the former aims at testing legal and practical reality against a pre-existing model of the State and sovereignty, the latter seeks to retrieve the content of the concepts of State and sovereignty entirely from a new reality. Both approaches put sovereignty at risk by, on the one hand, either corseting reality too tightly thus prematurely condemning new political and legal practices and cutting sovereignty off too early from reality by redefining it too strictly[55] or, on the other, by emptying it from any content whatsoever and thus limiting any possibility of conceptual continuity in the political and legal realm. It follows therefore that sovereignty is not a merely descriptive political concept that refers to an independent and objective reality. Nor is it a purely prescriptive political concept that insists on constraining political and legal reality according to an abstract standard. Sovereignty is more than what those entities which claim to be sovereign actually *are*, but it is less than what pre-existing abstract standards of sovereignty may require it should be.[56] Walker refers to those two ways of misunderstanding sovereignty as the *descriptive fallacy* and the *fallacy of abstraction*.[57]

Although neither approach is founded per se, they are not contradictory.[58] Like other legal and political concepts, sovereignty should account for political and legal reality and should therefore be able to fluctuate with it, although this mirroring effect cannot always be perfect. This does not mean, however, that the concept of sovereignty should not retain a certain normative impact on political and legal reality.[59] A third approach to legal and political concepts like sovereignty is therefore needed to reconcile the normative role of sovereignty with the profound changes in the political and legal reality. Sovereignty, like other central political and legal concepts, should be neither entirely closed nor entirely open; it should neither encompass all changes of reality, nor exclude any change of its paradigms, ie of its central exemplars in practice. Sovereignty is therefore best understood as what one calls in philosophy of language an *essentially contestable*

[53] See Troper, 2002.
[54] See on these two approaches, Häberle, 1967, 282.
[55] See MacCormick, 1999, 123. See also Jackson, 1999b, 434.
[56] In this sense, the present account differs from a purely constructivist one such as that of Aalberts, 2004, 40.
[57] Walker, 2003a, 6-7.
[58] See Virally, 1977, 179.
[59] See Skinner, 1989 and Farr, 1989.

*concept*.[60] Because the concept expresses one or many values it aims at protecting, different evaluations and conceptions of it can be given and this contestable nature is one of its main features.[61]

Sovereignty should be entitled to remain the same concept and hence establish a conceptual framework in which debates can take place,[62] while also fluctuating at the same time through changes of paradigms and of conceptions;[63] the essential contestability of sovereignty 'can account for both change and for continuity in change'.[64] Instead of understanding sovereignty as a plain fact or as a purely normative standard, the concept's essential contestability makes it possible to account for its institutional and discursive resilience while also respecting its normative input;[65] some authors also refer to the *double hermeneutic* of sovereignty[66] and the fact that the concept of sovereignty is not only an interpretation of the world, but that this interpretation is already part of that world and of its 'sedimented discourse'.[67]

## III. THE HISTORY OF CONTESTATION OF THE CONCEPT OF SOVEREIGNTY

### *A. The importance of historical contestation for the concept of sovereignty*

Since its origins, the content and implications of the concept of sovereignty have been controversial.[68] Of course, some conceptions have been more influential and more deeply entrenched than others. It is important, however, to understand that the history of the concept of sovereignty is above all one of 'conceptual migration' to borrow Richard Falk's terms;[69] different times in history generated different difficulties which influenced the answer sought to political problems and conditioned the function with which sovereignty was vested. The history of the concept of sovereignty

[60] See on this concept: Gallie, 1956; Waldron, 1994; Waldron, 2002; Dworkin, 1991; Connolly, 1983; MacIntyre, 1973; Gray, 1977; Gray, 1978; Miller, 1983. See on the contestable nature of sovereignty, Sorensen, 1999, 604. See in the European context, Bankowski and Christodoulidis, 2000, 18 who regard sovereignty, but also more generally the European Union as an 'essentially contested project'. See also Walker, 2000a, 32 and Walker, 2002, 345–6 on the contestable nature of sovereignty in Europe.

[61] See Dworkin, 1991, 90–101 on the relationship between a concept and its conceptions.

[62] See Richmond, 1997, 378–9.

[63] See Wildhaber, 1996, 43 and 45 who speaks of a *relative* concept.

[64] Aalberts, 2004, 39.

[65] See also Walker, 2003a for a 'speech-act' account of sovereignty.

[66] Walker, 2003a, 16–17. See already Richmond, 1997, 379-382.

[67] Howarth, 1995, 127–8, 132; Aalberts, 2004, 40–1.

[68] See Steinberger, 1997, 500 ff.

[69] Falk, 2001, 789.

amounts therefore to a succession of paradigms and conceptions constantly renewed to reply to each period's political and legal expectations.[70]

As a result, authors usually do not spend much time elaborating on what they take sovereignty to mean in general.[71] One finds limited references to *supreme authority* or *ultimate power*.[72] These two definitions refer to very different facets of sovereignty which correspond to its normative and empirical dimensions. Both have been present at different times in the evolution of the concept and their tension underlies most of the concept's history. This section will introduce some of the different conceptions of the polysemic concept of sovereignty, thus hopefully revealing how predominant conceptions today are in fact the result of historical tensions and contingencies.[73] Of course, an exhaustive presentation of the different transformations in the concept of sovereignty would clearly take us beyond the scope of this chapter.[74]

### *B. From Antiquity to the Wars of Religion: the emergence of modern sovereignty*

Roughly speaking, the concept of sovereignty has been present, albeit under different denominations, as a fundamental principle of the national and international political order since early Antiquity and more precisely since Aristotle. In its modern understanding, however, the emergence of the concept of sovereignty is usually traced back to the 17th century. Given the theocratic foundations of political power in medieval Europe, there was no need in the earlier Christian *universitas* to establish the sovereignty of a state on its territory.[75] Progressively, however, political power emancipated from religious power, and the establishment of a secular and territorial authority took place through the development of the principle of sovereignty of States of equal power. More precisely, the modern conception of sovereignty is usually said to date from its official consecration in the Treaty of Westphalia in 1648. It was then that the principle of territorial delimitation of state authority and the principle of non-intervention were formally

[70] See Mayall, 1999, 475. See also Jackson, 1999b, 433.

[71] See, eg, Walker, 2003a; Bellamy, 2003; Maduro, 2003 for an example of this intentional imprecision in the presentation of the concept's contours.

[72] See in particular Hinsley, 1986; Virally, 1977, 190; Sorensen, 1999, 597 ff.; Kelsen, 1926, 254. See a critique by Schmitt, 1996, 26. I am using the terms 'authority' and 'sovereignty' interchangeably in this chapter to refer to normative sovereignty. One way of distinguishing sovereignty from authority is to understand them as referring to the same object but seen from different perspectives: that of the sovereign in the former and that of the subjects in the latter (Besson, 2004a).

[73] See Krasner, 1993, 235 ff. See also Walker and Mendlovitz, 1990; Schmitt, 1996, 25.

[74] See Dennert, 1964, 101 ff. For a detailed presentation of the historical origins of sovereignty, see Wildhaber, 1996, 19 ff.

[75] See Jackson, 1999b, 435 ff.

established. It is important to bear in mind, however, that this constitutes a historical simplification; modern sovereignty was in fact established prior to 1648, on the one hand, and sovereignty was questioned later until the end of the Austro-Hungarian Empire, on the other.[76] It was only after the fall of the Empire and the weakening of the Concert of Nations that the model of coexistence of equal and sovereign States could be deemed predominant.[77]

Given the difficulty there is to relate the concept of modern sovereignty to precise historical events, *theoretical models of sovereignty* have become the reference in historical accounts of the development of sovereignty. The first theoretical model of State sovereignty is often attributed to Jean Bodin and his *Six Livres de la République* published in 1576.[78] This book provided the first coherent theory of state sovereignty, although it was only towards the end of the 17th century that it was recognized as such. In a period of intense religious conflicts, Bodin describes an authority capable of putting an end to the war: the Republic. This account of sovereignty differs from the medieval conception in that it separates sovereignty from the person of the sovereign; sovereignty becomes a real *function* which can be attributed to any person or institution. This sovereign authority cannot by definition be subject to any rule or restriction and as such it does not yet have the normative dimension it will be vested with later on; according to Bodin, sovereignty amounts to the absolute and perpetual power of the Republic.[79] The sovereign is not even submitted to its own laws, although it is of course *limited* by natural law and rules of divine origin.[80] By the time Bodin had issued his model of sovereignty, both the notion of sovereignty *qua* function and the notion of limited sovereignty, which were to become the pillars of the modern conception of sovereignty, were ready to be developed further.

### *C. From the Social Contract to the 20th century: the fleshing out of modern sovereignty*

#### *1. From Hobbes to Kant: sovereignty qua normative concept*

A hundred years after Bodin, the English author Thomas Hobbes recast the idea of sovereign authority with his *Leviathan*. In this first version of the social contract, the sovereign is still conceived as an absolute master, but its power is clearly no longer original and unconditional. It results from a contract among individuals and amounts to a *function or property of the*

[76] See in particular Jackson, 1999b, 438 ff.
[77] See Krasner, 1993, 264.
[78] See more particularly Quaritsch, 1970; Quaritsch, 1986; Guggenheim, 1968.
[79] See Bodin, 1993, Book I, Chapter VIII, 122.
[80] See Bodin, 1993, Book I, Chapter VIII, 122–9, 158–61.

*state* and the legal order, which can be attributed or reattributed if necessary. It is no longer the quality of a person or group of people in particular.[81] According to Hobbes, the supreme authority of Leviathan should enable the English people to escape civil war through a fictive social contract among individuals which can in turn secure peace in exchange for freedom. The sovereign and its laws are vested with absolute authority and as such there are no normative limits on the sovereign, but, as for Bodin, the sovereign is *limited by the laws of nature* and in particular the individual right to protect one's own life.[82]

Fifty years later, this quasi-absolute conception of State sovereignty was questioned by John Locke. In Locke's social contract theory, the authority of the sovereign no longer derives from a social contract among individuals, but from a contract between individuals and the sovereign who can therefore be held accountable for a violation of the contract and for the infringement of individual rights in particular.[83] It is crucial, according to Locke, to establish strict limits to the power of the sovereign and to ensure a division of powers as well as constitutional control of the latter. The idea of *divisible* and *limited sovereignty* had therefore emerged.[84]

It was Jean-Jacques Rousseau who a few years after Locke succeeded in reconciling the quasi-absolute and extremely resilient conception of sovereignty one finds in Hobbes with a more constitutional approach to its limits. He does that by consecrating popular sovereignty and explaining how the exercise of the sovereignty of political institutions is submitted to the respect of the general will.[85] Political sovereignty becomes a mere reflection of *popular sovereignty*; if the sovereign does not respect popular will, it risks losing its attributions. Sovereignty and democracy were clearly bound from then on and sovereignty could both be deemed absolute when it is original, and limited when it corresponds to derived political or institutional sovereignty. In the following centuries, those conceptions of popular sovereignty and democracy dominated debates on the concept of sovereignty. Gradually, however, debates about sovereignty were replaced by discussions of more substantive questions and more specific concepts like democracy or fundamental rights.

[81] See Wildhaber, 1996, 20. See also Bodin, 1993, Book I, Chapter VIII who refers to the sovereignty of the 'Republic'. See also Kelsen, 1926, 254.

[82] See Hobbes, 1999, ch 30, 231. As for Bodin, these limits only apply *in foro interno;* the sovereign is not accountable to others for the violation of the laws of nature.

[83] See Locke, 1999.

[84] It is an idea one finds again later in Jeremy Bentham's model of constitutionalism and divided sovereignty. See Ben-Dor, 2000; Besson, 2003d.

[85] See Rousseau, 1962.

### *2. Kelsen and Schmitt: sovereignty qua purely empirical concept*

In the course of the 20th century, the concept of sovereignty entered into a formalization phase which progressively emptied it from any evaluative content and consequently of the normative constraints which had been inherent to it since Bodin. Sovereignty remained a function or property of the state or the legal order, but it was no longer limited by external values. One finds this formal concept of sovereignty in Kelsen's, but most vigorously in Schmitt's writings.

According to Kelsen's legal theory, sovereignty remains a normative concept, but it is a legally normative concept and not a moral one. State sovereignty implies that its legitimacy and authority can be established by reference to the legal system alone.[86] According to Schmitt, by contrast, the concept of sovereignty is not even normative in a legal sense anymore. It is a legal concept, but a purely empirical one in that it refers to a factual situation; the sovereign is that entity which is vested with the ultimate power of solving extreme situations.[87] For Schmitt, the mixture of legal and moral elements that prevailed in earlier conceptions of sovereignty actually generated the fundamental difficulties encountered by sovereignty in its history.[88]

## *D. From the post-war era to recent times: the development of international sovereignty*

If, for a long time, the *internal* sovereignty of the state on its territory and in its internal affairs lay at the heart of debates, the question of *external* sovereignty of the state in its international relations gradually moved centre stage during the 19th century. It is important to start by observing that the notion of external sovereignty was not entirely absent from classical authors' considerations. The emergence of modern sovereignty went hand in hand with claims to external independence and this concern may be retrieved, for instance, in Machiavelli, Bodin or Hobbes' writings. It is only much later, however, that these concerns and claims were properly conceptualized *qua* external or international sovereignty.

As we saw before, the emergence of the modern state was matched by the development of centralized political and legal orders which were territorially and personally determined and between which there were no links of subordination. Alongside conflicts of sovereignty among independent states, the necessity of developing *international legal rules* gradually emerged; in the absence of supreme power, sovereign states could only be held accountable to each other according to freely endorsed obligations and the only way of ensuring the respect of these obligations was to impose legal

[86] See Kelsen, 1928, 22 ff, 40 ff. [87] See Schmitt, 1996, 11 ff. [88] ibid 26.

rules for mutual respect of sovereignty. Without such legal rules, sovereignty would be reduced to mere factual power.[89] It follows therefore that public international law and external sovereignty imply each other;[90] to be fully in charge of its relations with other states, a state must take part in the creation of international public law and for public international law to be developed, there must be independent sovereign states.[91] Very quickly, it became impossible to separate external sovereignty from public international law.[92] Since sovereignty implies the existence of public international law, it is inherently limited; even if, by definition, a sovereign state is not limited by the laws of another State, it *is* when these laws result from the collective will of other States.

Even though the relation between external sovereignty and public international law is one of mutual constitution, certain difficulties gradually arose by virtue of the growing interdependence of states in the international order. In an increasing number of cases, international law limits states without their consent;[93] external sovereignty is therefore limited in a non-sovereign way in those instances. Some see this as incompatible with the principle of sovereignty, while others see this as part of the new inherent and universal limits to external sovereignty.[94] This is the case in the field of human rights and *ius cogens* in particular.[95]

## IV. THE CONCEPT OF 'ESSENTIALLY CONTESTABLE CONCEPT'

### *A. A definition of the concept*

One of the objectives of this chapter is to establish that the concept of sovereignty not only amounts to a complex and normative concept, but also that it is an *essentially contestable concept*. As such, it is a *concept that not only expresses a normative standard and whose conceptions differ from one person to the other, but whose correct application is to create disagreement over its correct application or, in other words, over what the concept is itself*. The concept of 'essentially contestable concept' owes its original formulation to William Gallie in 1956.[96] Since then, the concept has been

[89] See Virally, 1977, 191.

[90] See Bleckmann, 1994, n 13.

[91] See Pfersmann, 2001, 34.

[92] See Brownlie, 1979, 287: 'Sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law.'

[93] See Bleckmann, 1994, n 14.

[94] See on the notion of limited international sovereignty, Grotius, 1913, I and III, s 16, 61 and de Vattel, 1774, Book I, Ch IV, s 39, p 52.

[95] See Wildhaber, 1996, 39-40.

[96] Gallie, 1956, 169: '[these concepts'] proper use inevitably involves endless disputes about their proper use on the part of their users'.

re-used and further developed in moral and political philosophy,[97] but also in legal philosophy,[98] although not always in a discerning manner.[99]

Traditional approaches to normative concepts, like the concepts of democracy or justice, are extremely cautious about the role of contestation. They do not consider normative contestation as part of those concepts' correct application. On the contrary, most authors distinguish between the phase of descriptive conceptual analysis, on the one hand, through which it is possible to identify and establish minimal criteria of application of normative concepts in an objective way and the normative discussion of these concepts, on the other, during which phase only it is possible to contest the assessment of the values those concepts encompass and protect.[100] It is crucial to understand, however, that disputes which surround normative concepts cannot be compared to those about *criterial concepts* such as 'book' or 'chair'. In those cases, there is sufficient consensus to accept the existence of minimal criteria of correct application and contestation over those criteria can be explained in terms of error.[101] In the case of *normative concepts*, however, contestation goes to the heart of the concepts and is not limited to its peripheral cases of application,[102] without it being necessarily evident that those contesting so-called criteria of application are necessarily mistaken.[103] It is implausible in those conditions to separate prior conceptual analysis from normative contestation.[104]

To claim essential contestability, it is surely not enough to say that a concept is *normative*; it is a necessary condition for it to encompass one or many values, but it is not a sufficient condition since some normative standards might be pre-established in a criterial way. Nor is it enough to refer to the evidence of its historical and cultural variability and the disputes over its correct application, as I did in the previous section. Empirical and contingent claims like these would be claims of mere contestedness. To claim that a concept is *contestable* is to make the philosophical claim that debates about the criteria of correct application of a concept are inconclusive.[105] Finally, to claim that a concept's subject matter is such that there are always good reasons for someone to dispute the propriety of any of its

[97] See Hampshire, 1959; Connolly, 1983; MacIntyre, 1973; Gray, 1977; Gray, 1978; Miller, 1983; Ricciardi, 2001.

[98] See Waldron, 1994; Waldron, 2002; Dworkin, 1991; Dworkin, 2004.

[99] A brief search in the legal doctrine reveals that a surprising variety of legal concepts is now regarded as being essentially contestable and this without a precise definition or justification. See Gray, 1977, 339.

[100] See Miller, 1983, 39 ff.

[101] See Raz, 1998.

[102] See Besson, 2005b for a more detailed account of these concepts.

[103] See Dworkin, 2004.

[104] See Miller, 1983, 39.

[105] A majority of authors still refers, however, to essentially *contested* concepts by reference to Gallie, 1956.

uses, is to claim its *essential* contestability; the 'essentiality' of its contestability does not mean that the disagreements that surround its meaning are irresolvable,[106] but that, on the one hand, disputes about the meaning of the concept go to the heart of the matter and can generate *rival paradigms and criteria of application* and that, on the other, it is part of the *very meaning and essence* of the concept to be contested and to raise questions as to its nature.[107] It is this third and *conceptual* claim that I am making here.

In Connolly's slightly refined version[108] of Gallie's definition of essentially contestable concepts,[109] a concept is essentially contestable (i) when it is *appraisive* in that the state of affairs it describes is a valued achievement which is initially variously describable,[110] (ii) when this state of affairs is *internally complex* in that its characterization involves references to several dimensions of meaning[111] as opposed to judging something to be 'red', and (iii) when its *criteria of application*—whether shared or disputed—are themselves relatively *open*, enabling parties to interpret even shared criteria differently, both across a range of familiar cases and as new and unforeseen circumstances arise.

### *B. Some implications*

After this brief clarification of the concept of essentially contestable concepts, it is important to discuss some of the general implications of the use of such concepts.

First of all, the recognition of the existence of essentially contestable concepts does not imply taking a *sceptical* stance.[112] It is entirely consistent with the existence of objective values; although the concept of justice is contestable and although parties to the disagreement hold reasonable but conflicting conceptions of it, this does not prevent one of them from being right and the other wrong. This explains why the recognition of essentially contestable concepts on the part of participants in the political discourse is compatible with the willingness to deliberate and exchange arguments with others; one may hope to convince others without, however, necessarily having to believe that it is possible to find the right conception in all cases.[113]

[106] I disagree with Gray, 1977, 340 ff. on this point.
[107] See Waldron, 1994, 529–530 on these two meanings added by the term 'essential' to the contestability of a concept. See also Freeden, 2003, 53.
[108] See Connolly, 1983, 10 ff. See also Hurley, 1989, 46.
[109] See Gallie, 1956, 171 ff.
[110] See Connolly, 1983, 11.
[111] See Hurley, 1989, 47. See also Raz, 1998.
[112] See Connolly, 1983, 7 and 41.
[113] See Waldron, 2002, 153.

Secondly, the recognition of the essentially contestable nature of a concept is an *analytical* statement. It implies the possibility of conceiving a concept as normative, that is to say as encompassing a contestable value. It does not therefore protect against analytical mistakes or errors of judgement.[114] It is important to note that what enables the parties to know that their disagreement about an essentially contestable concept pertains to the same concept and not to two different concepts lies in the exemplars or *paradigms* they share before starting the discussion. These are provided by those central cases in which the concept clearly applies. What distinguishes paradigms from criteria and agreement over them[115], however, is the evolutive nature of the former; paradigms adapt to new circumstances and can be entirely ousted in favour of new paradigms in the course of discussion, provided these changes are made gradually and that some minimal paradigms are shared to start the discussion.[116]

## V. SOVEREIGNTY *QUA* ESSENTIALLY CONTESTABLE CONCEPT

There are three main conditions to be fulfilled for the concept of sovereignty to be regarded as an essentially contestable concept: the concept must be *normative*, *intrinsically complex* and *a-criterial*.

### *A. Sovereignty* qua *normative concept*

As a normative concept, the concept of sovereignty expresses and incorporates one or many values that it seeks to implement in practice and according to which political situations should be evaluated.[117] These values are diverse and include, among others, democracy, human rights, equality and self-determination.

[114] ibid 152.

[115] See Wittgenstein, 1958, 242: 'If language is to be a means of communication, there must be agreement not only in definitions, but also (queer as it may sound) in judgements'. See more recently, Raz, 1998 on criterial agreement.

[116] See Dworkin, 1991, 72.

[117] See Virally, 1977, 180: '*Par les valeurs qu'il exprime*, par la logique interne qui lui est propre, [le concept de souveraineté] présente un dynamisme dont l'orientation effective dépend du système juridique dans lequel il est utilisé.' (emphasis added). See also Thürer, 1999, 39, 40: 'Thus, the basic idea which provides the foundation for our analysis and evaluation of the globalizing evolution of the international system is that, due to its purpose and because of its very nature, state sovereignty represents a *value-laden* notion. It does in fact, as a concept of present-day international law imply the *capacity to realize human rights and other basic values recognized by the international community*' (emphasis added). See also Jackson, 1999b, 434; Müller, 1999a, 133 ff. See also Walker, 2000a, 33 who regards legal sovereignty as a normative concept which entails an attempt at justifying the law's authority.

Concept determination amounts therefore to more than a mere description of the concept's core application criteria; it implies an evaluation of a state of affairs on the basis of sovereignty's incorporated values. What lies behind the prima facie categorical use of central political and legal concepts like sovereignty are not facts that should be established, but conceptions and interpretations that should be evaluated and maybe amended in order to account better for the values encompassed by these concepts.[118] It follows therefore that the determination of the concept of sovereignty cannot be distinguished from the values it entails and from the normative discussion that generally prevails around it.[119]

### *B. Sovereignty* qua *complex concept*

The second condition for the essentially contestable nature of the concept of sovereignty is the *complexity* of the concept. The concept of sovereignty clearly encompasses different dimensions of meaning by contrast to a simple concept like 'chair'. There are three main dimensions one should mention: the concept of sovereignty *qua* outcome, the concept of sovereignty *qua* question and the concept of sovereignty *qua* value. Sovereignty is therefore at once a result, a question as to what this result should be and a justification of this result in terms of values.[120]

#### *1. The complexity of sovereignty* qua *outcome*

The difficulty of general concepts like the concept of sovereignty is that they give rise to a plurality of criteria and principles whose content is extremely contestable. These different criteria constitute what can be referred to as the concept *qua* outcome or result-concept of sovereignty; they contribute to determining what sovereignty *is* as a state of affairs or achievement.[121] These criteria qualify the minimal and relatively uncontroversial statement of sovereignty as the *ultimate and supreme authority* or *power of decision*

[118] Kelsen, 1926, 255: '[Etablir ... si tel Etat considéré est souverain ou non n'est pas un] jugement de réalité, mais un jugement de valeur. Plus précisément, il ne s'agit pas d'établir un fait, naturel ou social; mais bien—nous aurons à le démontrer—d'une hypothèse. *Discuter sur la souveraineté de l'Etat, c'est raisonner sur des hypothèses de science juridique.* Le problème n'est pas un problème d'observation, mais d'interprétation de certains faits; et bien des interprétations sont possibles [...].' (emphasis added).

[119] See Rhonheimer, 1989, 262–3. See also Thürer, 1999, 39, 40 by reference to Müller, 1999a, 132. See also Kelsen, 1961, xvii; Kelsen, 1942, 54-5. See Mayall, 1999, 475. See also Dworkin, 2004 contra Raz, 1998.

[120] In this respect, it is interesting to draw an analogy between the description by Schmitt, 1996 of the paradox of sovereignty, ie its normative *cum* factual dimension, and the double dimension just described of sovereignty *qua* result and sovereignty *qua* justification.

[121] See in particular James, 1999, 462. See also Philpott, 1999, 570 ff.

and are sometimes described as *constitutive rules of sovereignty*.[122] They are heavily contested in practice, not only per se, but also inside each group of oppositions where different conceptions can be defended.

### *a. Political and legal sovereignty*

Political and legal sovereignty have always been closely linked in the history of the concept; most theories either derive legal sovereignty from political sovereignty or vice-versa. Among the different controversial distinctions one finds in the development of the concept of sovereignty, this opposition is probably one of the most contested ones. The paradox of *pouvoir constituant* and *pouvoir constitué* or of *rule sovereignty* and *ruler sovereignty* is inextricably tied to the claim to sovereignty; political sovereignty is difficult to conceive without rules to exercise and constrain that sovereignty, but legal sovereignty is hard to fathom without a political power to establish its legal rules in the first place. Different accounts have been given of the priority between political and legal sovereignty across the centuries and have contributed to perpetuating the centrality of the concept of sovereignty. Some authors have even argued that this paradox and mutual claim are testimony of the conceptual incoherence of sovereignty.[123] While Austin and command theorists give priority to political sovereignty over legal sovereignty, Hart and later positivists give priority to legal sovereignty over political sovereignty.[124] Other authors like Kelsen argue, on the contrary, that political and legal sovereignty are identical and cannot therefore be put in any relationship of priority.[125] More recently, some authors have tried to dissociate legal and political sovereignty and re-associate legal to institutional sovereignty.[126]

At a time when state and law, and more generally the political and the legal tend to drift apart in practice, as demonstrated by the emergence of the European legal order, the development of *lex mercatoria* and other forms of transnational global law,[127] the sovereignty of law must somehow be able to be kept conceptually distinct from state and maybe from political sovereignty. The question that arises is the following: while it must be possible to distinguish political and legal sovereignty from each other, is it

[122] See Sorensen, 1999, 592.

[123] On this issue, see MacCormick, 1995, 95–100 by reference to Foucault in particular; Walker, 2003a, 19-21.

[124] See MacCormick, 1993.

[125] See Kelsen, 1961; Pfersmann, 2001.

[126] On the dissociation of law from the state, see MacCormick, 1999, chs 1 and 2. Note that MacCormick, 1999a, 128 also dissociates *political* power from legal sovereignty in his institutional theory of law; it is difficult, however, to see how institutional power implied by legal sovereignty can be distinct from political power in general.

[127] See Teubner, 1997.

possible to do so without giving one priority over the other but without, however, having to give one up for the other?[128]

The law remains a political instrument and creation, whether at the national, European or international level. As a consequence, legal sovereignty will most of the time match political sovereignty.[129] It is difficult to see how the sovereignty of European law, for instance, can be pertinent outside its relationship to political sovereignty in the EU in the field of competence of the legal norm in question. Conversely, however, it is difficult to understand how political sovereignty can be exercised in the EU without legal sovereignty, in particular with respect to the constitutional determination of the structure of political power and competences.[130] Sovereignty amounts to the competence of a political entity,[131] hence the idea of 'competence of the competence' and the difficulty to establish one's own competences without legal sovereignty. It follows therefore that legal and political sovereignty, even though they are conceptually distinct and can exist separately in some cases, are not logically separable in the long run.[132] This also implies that when they are both granted, neither of them can be given priority over the other. There is, in other words, an *imperfect logical relationship* between the two forms of sovereignty.[133]

In fact, this interpretation of the relationship between political and legal sovereignty solves a long-standing paradox or at least makes the most of it.[134] Sovereignty should be situated at the boundary between politics and law or between democracy and rights, rather than being clearly embedded in one or the other. As Walker argues, the double claim to political and legal sovereignty should 'be viewed more constructively as the conceptual key to sovereignty as a dynamic process of mutual constitution and mutual containment of law and politics.'[135] It is crucial for the legitimating effect

[128] See, eg, MacCormick, 1999, 18 ff; Habermas, 1998.

[129] See, eg, Douglas Scott, 2002, 255. See also Hobbes, 1999 on the dependence of law on the state.

[130] See James, 1999, 462–3. See on sovereignty and constitutionalism, Lindahl, 1997.

[131] See Pfersmann, 2001, 35. See on sovereignty *qua* competence, Schmitt, 1996, 14, 17. Contra: Wildhaber, 1996, 46 ff.

[132] Contra: Walker, 2000a, 33 who considers political sovereignty as a purely descriptive concept which does not account for the authority of the entity it characterizes, whereas legal sovereignty is a normative concept which does. This position is not tenable, however. It is difficult to see how the same concept can change *nature* in two different contexts. It remains normative and contestable in both cases, even though the values it protects in those cases and hence its *content* may differ. Besides, Walker refers to political sovereignty *qua* measure-concept and later on to legal sovereignty as a threshold concept, thus conflating their functions. Finally, most recently, Walker, 2003a, 19-21 no longer seems to draw a distinction in the content of political and legal sovereignty which he regards as interdependent facets of sovereignty.

[133] See MacCormick, 1999, 25; MacCormick, 1993, 11.

[134] See Walker, 2003a, 19–21; Bellamy, 2003, 171–5; Maduro, 2003, 502.

[135] Walker, 2003a, 19–20.

of the competitive and cooperative exercise of sovereignty in the EU that it be subordinated neither entirely to a legal and normative division of competences nor entirely to political power and to the rule of the majority.[136] On the contrary, both forms of sovereignty should be kept in tension and mutual relationship for the values protected by both forms of sovereignty to be enforced at best.[137]

### *b. External and internal sovereignty*

Traditionally, the concept of sovereignty has always operated in two distinct ways: sovereignty can be exercised in relation to one's internal affairs, on the one hand, but also to one's external affairs, on the other. Even though there exists a historical and conceptual link between these two forms of sovereignty, it is important to distinguish between them in practice. First of all, different institutions exercise sovereignty in both cases: the executive acts as a sovereign in external affairs, while it is usually the legislative which is regarded as sovereign in internal affairs. Hence the difficulty there is sometimes of distinguishing between Parliamentary sovereignty on the inside and national sovereignty on the outside.[138] Secondly, their functions differ; whereas internal sovereignty pertains to all political and legal matters, external sovereignty usually only relates to questions of cooperation among distinct sovereign entities. Finally, external sovereignty can less easily be described as final or ultimate as it is necessarily equal; it can only be equally ultimate since a sovereign can only co-exist as an equal to other sovereigns.[139] In internal affairs, however, sovereignty is usually final.

Some authors argue therefore that both forms of sovereignty can be kept distinct.[140] Although they may be, conceptually at least, they cannot be separated logically; for there to be external sovereignty, there must be internal sovereignty and vice versa.[141] Without external sovereignty, the internal sovereign cannot define the latter and without internal sovereignty in the constitutional determination of competences, there cannot be an external

[136] See Maduro, 2003, 537; Bellamy, 2003, 175.

[137] See Bellamy, 2003; MacCormick, 1997.

[138] Debates about sovereignty in the United Kingdom, for instance, tend to conflate both kinds of sovereignty. See, eg, the *Factortame* saga and Barber, 2000.

[139] Art 2(1) of the United Nations Charter guarantees the principle of sovereignty *and* the equality of states. See Bleckmann, 1994, n 6.

[140] See MacCormick, 1999, 129 who distinguishes the two concepts of internal and external sovereignty and considers that the latter can exist in the absence of the former.

[141] On this notion of 'Relationsbegriff', see Rhonheimer, 1989, 263. See also Loughlin, 2003 on the importance of the relation between those who govern and those governed for the concept of sovereignty. See also Walker, 2003a for a relational concept of sovereignty. See finally Aalberts, 2004, 37.

sovereign and no human rights limitations in particular.[142] It is difficult therefore to place one before the other in a logical order of emergence.[143]

This issue is particularly relevant in the European context; contrary to federal states, the European Union was not created through the gradual concession of Member States' external sovereignty.[144] Most transfers of competence relate to internal matters. Many authors have deduced from this that the only kind of sovereignty one should be concerned with in the European context is internal sovereignty. MacCormick even contends that Member States' external sovereignty is reinforced through European integration.[145] This, however, underestimates the strength of the bond between these two forms of sovereignty; with less internal sovereignty, external sovereignty is also affected and has gradually shrunk at national level. Moreover, Member States' external sovereignty has progressively been directly reduced by the European Union's increase of external representation competence.[146]

### *c. Absolute and limited sovereignty*

The question of the degree of power and amount of competence necessary for an entity to become or remain sovereign has given rise to a long controversy in the history of the concept. According to some authors, sovereignty can only be absolute; this is the classical conception of sovereignty one finds in Bodin and Hobbes in particular.

Even though it has been a predominant conception for a long time, this *absolute conception of sovereignty* cannot account satisfactorily for new developments in political and legal organization. More precisely, it ignores the plurality of sources of law and power in the new world order and what is often referred as constitutional pluralism, ie the post-Westphalian order characterized by the co-existence of autonomous constitutional orders in the same political and legal community and territory.[147] This is most particularly the case of external sovereignty which, as I argued before, cannot be regarded as ultimate or final; it is inherently limited since public interna-

[142] For instance, it is the German Constitution which in its Art 23 determines the conditions under which Germany can transfer sovereign competences to the EU. As a consequence, it is internal sovereignty which determines the contours of internal sovereignty, but also of external sovereignty. See, eg, the famous decisions *Solange I* in 1974, BVerfGE 37, 271; *Solange II* in 1986, BVerfGE 73, 339; *Maastricht Urteil* in 1993, BVerfGE 89, 155.

[143] See Pfersmann, 2001, 38–9 on this double determination of external sovereignty. See also Bleckmann, 1994, n 7 and 11. See also James, 1999, 464 who insists on the unitary nature of the concept between its external and internal aspects.

[144] See Pfersmann, 2001, 37; Weiler, 2002.

[145] MacCormick, 1999, 133; MacCormick, 1996, 553.

[146] See, eg, Art I-27 of the Constitutional Treaty on the establishment of a EU Minister of Foreign Affairs.

[147] See Walker, 2003a, 4; Walker, 2002.

tional law and external sovereignty imply each other.[148] It is important to realize, however, that these inherent limitations to external sovereignty have also become constitutive limitations to internal sovereignty[149] given the internal impact of many external agreements, such as human rights instruments, for instance.

In response to these difficulties, some authors have suggested the idea of *limited sovereignty*. The problem arising from this model is to know when sovereignty is so limited or fragmented that there can be no talk of sovereignty anymore. The concept of sovereignty implies a certain amount of intensity or of competence over a range of matters.[150] As we saw before, sovereignty is a general competence, ie a competence to determine one's particular competence; as such, it requires a minimal level of control over those competences. In other words, is there a *threshold* below which sovereignty is emptied of any content and if so, where does it lie? Some authors have denied this identification of sovereignty with a *threshold-concept*.[151] One argument against it may reside in the contestation of sovereignty and hence of this minimal threshold. As I explained before, however, the essentially contestable nature of the concept of sovereignty is an analytical statement which is perfectly compatible with the recognition of the normative content of the concept and of its contestability. One might therefore consider that these minimal threshold constraints are part of the analytical framework one has to assume when using a contestable concept, ie that it is a concept, that it encompasses values, that it is contestable, etc.

It remains difficult, however, to establish where the minimal threshold of sovereignty lies.[152] Some authors merely agree with the idea of a threshold without providing more information.[153] Others enumerate different competences which might constitute a minimal threshold of authority and be used to identify a sovereign entity.[154] They mention territorial supremacy, control over nationality acquisition, immigration control or

[148] See Wildhaber, 1996, 46.

[149] See Bleckmann, 1994, n 21; Wildhaber, 1996, 39; Virally, 1977, 190–1.

[150] See Walker, 2000a, 34 who refers to Lee, 1997, 245. See also Pfersmann, 2001, 37.

[151] See Kostakopoulou, 2002, 148.

[152] See Lee, 1997, 246 who refers to the test of 'substantial preponderance of power', but leaves the question open as to when this degree of substantial preponderance has been reached.

[153] Wildhaber, 1996, 49: 'The member states have delegated some of their sovereign powers, but have retained a *sufficient* amount of substantive competences in order to continue to qualify as 'normal cases' of states. [...] [Sovereignty] accepts political or economic dependencies in fact, as long as the discrepancy from the normal case is not too *glaring*' (emphasis added). See also Douglas Scott, 2002, 260–1.

[154] See especially Walzer, 1981, 10. See also Sorensen, 1999 who contrasts different 'constitutive rules' of sovereignty which do not change, with 'regulative rules' of sovereignty which change according to circumstances. See Jackson, 1990, 6 who refers to the *Grundnorm* of sovereignty.

national security.[155] Others on the contrary mention different competences, but add that their absence does not affect the existence of sovereignty.[156] Generally, the problem is the absence of consensus and the constant change in the paradigmatic constitutive elements of sovereignty. The content of the threshold cannot but remain contestable and different paradigms have been used at different times in the history of the concept of sovereignty.[157] For instance, purely territorial sovereignty has gradually been replaced by a differentiated and overlapping functional form of sovereignty in the EU.[158] It is therefore one of the characteristics of sovereignty to be a threshold-concept, *whose threshold itself is contestable.*

### *d. Unitary and divided sovereignty*

Another related distinction pertains to the divisibility of sovereignty. The issue whether sovereignty can be divided is as controversial as that of whether it can be limited.[159] In fact, both issues are very closely connected and often conflated. Traditional and recent literature refer to absolute sovereignty to mean unlimited sovereignty as much as indivisible sovereignty.[160] For the sake of clarity, I will refer to absolute sovereignty by contrast to limited sovereignty only, although divided sovereignty can obviously no longer be deemed absolute either.

The opposition between unitary and divided sovereignty is a traditional one. Authors like Bodin or Hobbes fear the division of sovereignty as much as its limitation. In a post-Westphalian world where competences are not only limited, but also shared, however, such fears have become obsolete; divisions of competences are indeed the rule in the European Union and beyond. This applies in almost all domains and at all degrees of authority. Sometimes, it is even more than a matter of fact, as shown by the possibility to transfer sovereign competences provided by Article 23 of the German Basic Law.[161] Of course, some have argued that sovereignty is not strictly divided in those cases, but that it is its exercise that is delegated and hence

[155] See the list in Kostakopoulou, 2002, 150 ff.

[156] See, eg, Wildhaber, 1996, 46 ff.

[157] This has been the case in France with monetary sovereignty in particular; the French Constitution and its sovereignty clause had to be revised to be made compatible with the Maastricht Treaty and the European Monetary Union. See on the French 'Maastricht decisions', Grewe and Ruiz Fabri, 1992; Olivier, 1994; De Witte, 1998.

[158] See, eg, Walker, 2003a in the European context. See also Lenaerts, 1990 on the absence of reserved competences in the EU: 'There simply is *no nucleus of sovereignty* that the Member States can invoke, as such, against the Community' (emphasis added).

[159] See, eg, the discussion in James, 1999; Wallace, 1999; Sorensen, 1999.

[160] See Hobbes, 1999, Ch 18, 127. See also Pogge, 1992, 57; MacCormick, 1999, 130.

[161] See Hobe, 1997, 133–4 on this issue. See also Joerges, 2002, 138; Kirchhof, 1998, 940 ff; Kaufmann, 1999, 814 ff.

divided,[162] thus preserving *sovereignty's unity*.[163] This argument cannot, however, account for the extremely high degree and complexity of transfers of competences in the EU in particular.[164]

In response to the limits of the unitary approach to sovereignty, the idea of disaggregation and reaggregation of sovereignty has been brought forward by some to grasp the poly-centred dimension of contemporary sovereignty.[165] The problem with this kind of model of *pooled, divided or shared sovereignty*, however, is that by being everywhere, it seems that sovereignty is nowhere particularly important.[166] As Walker argues, pooled sovereignty sits 'uneasily with the sense of sovereignty as a unifying and self-identifying claim made on behalf of the polity'.[167] It is important therefore to account for a minimal threshold of competences which may neither be limited nor shared. As we will see later, there is a third approach to sovereignty in a post-Westphalian world that is neither unitary nor pooled but that does not abandon the idea of ultimate power and authority altogether; it is the idea of *cooperative sovereignty*. It is crucial to understand that the possibility of conflicts and divisions in the absence of a unitary conception of sovereignty need not be conceived as problem; they belong to democratic life and we should make the most of them by promoting dialogue and duties of mutual adjustment in plurality.[168]

### *e. Institutional and popular sovereignty*

This last distinction goes back to Rousseau's account of political sovereignty and the dissociation of the original sovereignty of the *demos* from that of political institutions. According to this conception, political authorities' sovereignty is transferred to them through a social contract which binds them and holds them accountable to the original sovereign.[169] Through the social contract, the people constitutes itself as a distinct entity and sovereign while also transferring the exercise of its sovereignty to a constituted institutional sovereign. Thus, political and popular sovereignty are reunited, and then artificially separated in order to bind the sovereign to the people.

[162] See Maduro, 2003, 502 ff on conflicting sovereignty narratives. On these conflicts of sovereignty and constitutional conflicts more particularly, see Kumm, 2004.
[163] See De Witte, 1998 on proponents of this argument which was for a long time the argument of national authorities and courts in particular.
[164] See Maduro, 2003, 520.
[165] See, eg, Pogge, 1992.
[166] See De Witte, 1998, 303–5 on the contradictions of pooled sovereignty.
[167] Walker, 2003a, 15.
[168] See Pogge, 1992, 59. Contra: MacCormick, 1999, 130.
[169] See Rousseau, 1962.

The principle of popular sovereignty presents the advantage of providing a ready link between democracy and political participation, on the one hand, and sovereignty, on the other. It also lies at the origins of the connection between sovereignty and self-determination or national autonomy.[170] These issues play out in the European context where the democratic specificities of the European construction require conceptual imagination with respect to the relationships between national and European popular sovereignties and the many European *demoi*.[171]

### 2. *The complexity of sovereignty* qua *question*

This second form of complexity is generated by the different answers that can be given to the question of what the best allocation of power is in given circumstances, ie the different interpretations given to sovereignty *qua* outcome. The concept of sovereignty's specificity is that it does not only consist of a way to evaluate an outcome, but also of a normative question about what this outcome should be and how it should be reached.[172] It is a question-concept or a *reflexive concept* in the sense that it is part of its nature and application to constantly question what sovereignty is about.[173] Hence the idea of *sovereignty in conflict*.

#### *a. From sovereignty* qua *question to subsidiarity*

Given the complexity of the question of sovereignty, the concept's correct application implies a constant debate about how best to achieve sovereignty. Paradoxically, this approach to sovereignty is not without resemblance with the principle that is usually taken to be its opposite:[174] the principle of subsidiarity.[175]

The principle of subsidiarity is just as contestable a concept as that of sovereignty,[176] maybe intentionally so.[177] As a concept of power distribu-

[170] See Weiler, 2003, 16 on the *passé* nature of sovereignty claims by contrast to arguments of self-determination and national autonomy or identity.

[171] See, eg, Weiler, 1999, 324 ff; Weiler and Trachtman, 1997, 377 ff; Habermas, 2001; Walker, 2003a; Mény, 2003.

[172] See Waldron, 2002, 157 on the 'rule of law'.

[173] Bankowski and Christodoulidis, 2000, 24 and 30.

[174] See Estella, 2002, 10, 38.

[175] Literature on the principle of sovereignty has become too large to be exhaustively cited here. See, eg, Douglas Scott, 2002, 173 n 86; Müller, 1999b, 167 ff; Lecheler, 1992; Bermann, 1994; Peterson, 1994; MacCormick, 1995a; MacCormick, 1997; De Burca, 1999; Follesdal, 1998; Blichner and Sangolt, 1994; Estella, 2002; Bankowski, 1977; Emiliou, 1992; Toth, 1994; Henkel, 2002; Jones, 1997; Kumm, 2004a; Marquardt, 1994.

[176] See on this point, Blichner and Sangolt, 1994, 286 on the origins and the history of contestation of the concept. See in the European context, Peterson, 1994, 116; Preuss, 1999, 426.

[177] See Ward, 1996, 164.

tion, it is usually said to date back to the social and political theory of the Catholic Church, although both concepts no longer have much in common.[178] In a nutshell, the principle of subsidiarity is a *power allocation principle*: it requires that the entity that can best achieve a task be in charge of achieving it.[179] It was introduced in European law by Article 5(2) of the Consolidated Version of the Treaty establishing the European Community (ECT). It constitutes one of the key principles of the division of competences in the European Union; in the absence of exclusive competence, European authorities can only take action when the objectives of the proposed action cannot be satisfactorily attained by the Member States and therefore have a better chance of being achieved by the Community.[180]

Read together with sovereignty *qua* reflexive concept, the principle of subsidiarity implies a *test of efficiency* in power allocation. In each case, the sovereign authority will be that authority which can realize the objective in the most efficient way.[181] This applies to cases where different authorities claim sovereignty on the same issues, without any preference for the larger or smaller unit. European and national authorities may all be claiming sovereignty on an issue of basic equality between men and women and while all authorities retain their sovereignty, the final decision will be that of the authority that can ensure the best realization of the shared value of equality. Or, similarly, since democratic rule is one of the values protected by sovereignty, sovereignty may require allowing another authority to decide in a specific case if that endows those affected by that decision with a stronger voice and hearing.[182] This allocation of competences may be achieved through mutual adjustment and consistency in principle with one authority abiding by the other's past decisions on the issue, but also through actual delegation and transfer of competences;[183] sovereignty may indeed have to be transferred in parts to ensure the best realization of the values it

[178] See Weiler, 2004.

[179] See on the principle in general, Tomuschat, 1995, 18; Hobe, 1997, 149.

[180] Despite the addition of the Subsidiarity Protocol to the Amsterdam Treaty and its consolidation in the Constitutional Treaty, the principle has not yet had the impact it deserves at EU level. See Estella, 2002, 6–7. See also Kumm and Ferreres-Comella, 2004; Tridimas, 2004.

[181] See Müller, 1999b, 171 on the relationship of complementarity between sovereignty and subsidiarity.

[182] This does not mean that subsidiarity is itself a democratic principle; it may ensure the best realization of democracy possible, but cannot be identified with it. Just as one needs to identify a sovereign power before subsidiarity can apply, one needs to identify a democratic one for subsidiarity to ensure the best democratic allocation of power. See Bermann, 1994, 366: '[subsidiarity] starts off precisely where the conventional tools of constitutional federalism leave off and where legislative politics is ordinarily thought to begin.' Contra Follesdal, 1998, it is important to understand therefore that the principle of subsidiarity is an efficiency principle applied to political organization; it need not be justified independently from the political principles whose best application it ensures, except *qua* efficiency test.

[183] See Hobe, 1997, 148.

protects.[184] In all cases, this decision is a sovereign one, because it is not pre-decided and sovereignty has not been shared or divided;[185] questioning, emulation and cooperation are part of the regular exercise of sovereignty.[186]

As MacCormick argues, therefore:

> Europe's new way of parcelling out powers opens the door to a conception of subsidiarity that could gradually acquire real teeth. That is to say, once a process of sharing out powers is seriously undertaken, one can ask the question where it is best for the common good that a particular power be exercised.[187]

*b. Cooperative sovereignty*

Respecting subsidiarity in the fulfilment of one's sovereign tasks and duties can be considered as part of the correct application of the concept of sovereignty.[188] Because the preference is not necessarily given to the smaller unit, but to the best substantive outcome, this combined reading of sovereignty and subsidiarity can provide just the right balance between integration and subsidiarity.[189] Ever since its creation, the European Union has been oscillating between strong unification, on the one hand, and subsidiarity, on the other. As the European Union is deeply pluralist and disagreement-ridden, none of these alternatives has been in itself very promising; unification would undermine the flourishing of a political culture *within* Member States and subsidiarity would undermine it *between* them. Hence the attractiveness of a conception of sovereignty that would enable Europe to escape from this dualism between alienation and fragmentation, and this is precisely what *cooperative sovereignty* can provide.

More precisely, what the relationship between sovereignty *qua* question and subsidiarity reveals is that gradually the exercise of sovereignty has turned from an individual exercise into a *cooperative* enterprise.[190] This corresponds to the more general development of multilevel governance in a post-national constellation;[191] sovereign political entities can no longer

[184] See in the human rights context, Ermacora, 1966, 689.

[185] As such, it should not be confused with the delegation of competences or the division of competences. In the cases we are concerned with, all authorities have retained their authority in the matter discussed and are facing a true conflict of competences.

[186] See Waldron, 2002, 164.

[187] MacCormick, 1999, 142.

[188] See MacCormick, 1999, 135.

[189] On this question, see Besson, 2004a; Follesdal, 2000, 105.

[190] See Esher, 1999, 117; Hobe, 1997, 152-153; Virally, 1977, 193. See also Thürer, 2000, 592.

[191] See Habermas, 2001 on this post-national constellation and its impact on the cooperation between national states.

exercise their traditional competences and functions alone, especially, but not only, when these overlap within the same territory and apply to the same legal and political community.[192] This phenomenon matches the more general emergence of a post-national political and legal community with its own constitution or shared fundamental principles. It encompasses all sovereign authorities which are active in that community and whose rules and decisions affect the same people in that community. This is the case of European and national authorities in the EU or of international and national authorities in the rest of the world. In these conditions, sovereign authorities need to collaborate with other sovereign political and legal entities when applying the same rules and principles in this pluralist constitutional order[193] and this gives rise to a *participative* or *cooperative form of sovereignty*.[194] This form of sovereignty triggers duties of cooperation on the part of entities which cannot ensure the protection of all the values they should protect, as much as on the part of entities which can help the former protect those values they share.[195] They should all be seen as working towards the same end: the realization of their shared sovereign values and principles, such as human rights or democratic standards.[196]

Only when understood in this *cooperative* way, can sovereignty be the *reflexive* and *dynamic* concept it is, stimulating constant challenging of the allocation of power, thus putting into question others' sovereignty as well as one's own.[197] This common exercise of political sovereignty is then reflected in the structure of the relationship between the different legal orders at stake; none of them is ultimately and entirely submitted to another. This kind of legal cooperation reveals the possibility of a non-hierarchically organized plurality of legal orders, which may individually remain hierarchical in their internal structure or in their relationship to international law,[198] but which relate to one another in a heterarchical way.[199]

[192] See Tomuschat, 1995, 6–7; Thürer, 2000, 592.

[193] See MacCormick, 1999, 104, 131. See also Richmond, 1997.

[194] See Bleckmann, 1994, n 36. See also Esher, 1999, 117 ff; Thürer, 1999, 58; Magnette, 2000; Besson, 2003a; Besson, 2004a; Besson, 2005a.

[195] On this obligation to intervene based on sovereignty *qua* right, see Shue, 2004.

[196] See Besson 2004a, 271. See also Richmond, 1997, 415–17 on the importance of the sovereignty crisis for European integration.

[197] See on the dynamism of sovereignty, Virally, 1977, 180.

[198] See Richmond, 1997, 417 and MacCormick, 1999, 113–21 on 'soft pluralism' or 'pluralist monism' and the coexistence of independent albeit conflicting viewpoints between distinct legal orders in the European context.

[199] See Walker, 2002, 336 ff; Walker, 2003a; Maduro, 2003.

### 3. *The complexity of sovereignty* qua *value*

#### a. *The plurality of values of sovereignty*

This last form of complexity flows from the *plurality of values* and normative standards that the concept of sovereignty protects and to which it is held accountable. This gives a new significance to the 17th century conception of sovereignty *qua* function rather than personified authority;[200] it is not the identity of the political entity which determines its sovereignty, but only the values it pursues under the umbrella of sovereignty.

Understood along these lines, sovereignty is not an empirical end in itself, but should be exercised to protect the different values which constitute its justification.[201] These can include equality, human rights,[202] democracy,[203] national self-determination[204] or other values protected in the international community[205] such as tolerance, stability or cultural pluralism.[206] It is actually part of the complexity of sovereignty *qua* question for the values it protects to be contestable; in the course of the history of contestation of the concept, normative standards have not always been part of the concept of sovereignty and whenever they were, they were not always the same.

#### b. *Human rights protection qua criterion of sovereignty*

As explained before, the co-existence and interdependence of a plurality of sovereign states give rise to difficulties which call for consensually agreed upon rules of international law. Besides those conventional rules, however, the growing interdependence of States has also generated further rules of *ius cogens*, or more precisely, a universal human rights code, which apply to all sovereign states, whether they accept them or not.[207] Since those limits are now regarded as inherent to external sovereignty, they have also consequently become a *constitutive element of internal sovereignty* for reasons related to those two faces of sovereignty's logical connection.[208] Human

[200] On the end of unified because *personified* sovereignty in the European Union, see Cohen and Sabel, 2003.

[201] Bleckmann, 1994, n 30 et 37.

[202] See Müller, 1999a, 136 ff who refers to Huber, 1929, 17.

[203] When a sovereign State is democratic, one of the values sovereignty contributes to protecting is democracy. Hence current fears about the democratic deficit in Europe. See Müller, 1999b, 170 ff. See also James, 1999, 473.

[204] See MacCormick, 1999, 125 who associates sovereignty to national self-determination, and emphasizes the importance of the question of nationalism for debates about the future of sovereignty in Europe. See also Weiler, 2004, 149–52.

[205] See Thürer, 1999, 39.

[206] See Jackson, 1999b, 454.

[207] See Virally, 1977, 191; Tomuschat, 1995, 20. See also Huber, 1929, 17 on the *Palma* case.

[208] See Müller, 1999a, 132: 'Im folgenden Gedankengang möchte ich zu einem Souveränitätsverständnis hinführen, das die Anforderungen des internationalen

rights therefore constitute one of the values incorporated and protected by contemporary political and legal sovereignty, that is to say one of the goals of the exercise of sovereignty[209] and one of the standards according to which we hold that exercise accountable.[210] It follows that, in Western liberal societies, universal human rights guarantees condition the justified exercise of sovereignty and that sovereignty may be assimilated to the ability to protect and enforce human rights.[211]

This relationship between the justification of sovereignty and the protection of human rights has different implications for cases where sovereign authorities overlap in their areas of sovereignty while being held accountable to the same human rights instruments and fundamental principles.[212] The most important implication is that any activity related to the potentially cooperative exercise of sovereignty should aim at the protection of human rights as far as possible.[213] This applies to the transfer of competences of sovereignty, as much as to the intervention in case of negligence of these competences.

Primarily, the legitimacy of a *transfer of sovereign competences* from one political entity to the next depends on the conditions inherent in the exercise of sovereignty and these include the protection of human rights. Both the entity which transfers and the entity which receives sovereign competences should ensure human rights are better protected by this transfer. For a long time, and until human rights protection was ensured at a sufficient level within the European legal order, this was a very important issue in the European Union; Germany, for instance, has a reference to the protection of fundamental rights in its constitutional clause on the transfer of sovereignty to the European Union.[214] According to the principle proposed here,

Menschenrechtsschutzes nicht bloss als notwendige, gleichsam *zähmende Schranke* staatlicher Souveränität versteht; vielmehr ist die Gewährleistung elementarer Menschenrechtsgehalte heute als ein *konstitutives* Element staatlicher Souveränität, als eine ihr *immanente Aufgabe* zu qualifizieren' (emphasis added). See also Bleckmann, 1994, n 21.

[209] See Müller, 1999a, 139 on human rights *qua* limit to, but also *qua* constitutive element of external sovereignty. See also Thürer, 1996, 15; Reisman, 1990, 872.

[210] See Thürer, 2000, 578.

[211] See Thürer, 1999, 39. See Müller, 1999a, 120, 138.

[212] See Besson, 2003c.

[213] This implies that concerns about human rights protection in Europe need not be so deep. Contra: MacCormick, 1999, 125 ff.

[214] See Hobe, 1997, 133 on all potential transfers of competences allowed by Art 24 of the German Basic Law, within the limits of the principle of the intangibility of certain fundamental rights of Art 79 and on the notion of 'open state' which allows the state to intervene and to be intervened into without limits in international cooperation. See also Zuleeg, 1997 on the concept of 'open statehood'. This approach to Art 24 is not uncontroversial, however. In 1993, when the Maastricht Treaty was ratified, the German Federal Constitutional Court had to decide on the conformity of the Treaty with the German Basic Law and the principle of national sovereignty in particular. According to the claimants, Germany could not transfer sovereign competences to the EU so long as the latter was not sufficiently democratic. In its

transfers of sovereignty might not only be limited by human rights, but might also be *required* to ensure their better protection. It might well be, for instance, that the transfer of a particular competence to the EU might protect a national minority's interests much better than national decisions,[215] thus putting pressure on national authorities to improve the situation at the national level or else to transfer the competence to the European level.[216]

Secondly, in the case where a sovereign political entity neglects its human rights obligations, a *humanitarian intervention* may be called on human rights grounds and hence on sovereignty grounds. Indeed, the sovereignty of a 'failed' sovereign[217] requires that it seek ways of ensuring its duties and this may encompass accepting or even calling for an external intervention.[218] It is more complex to determine whether there is a right of the population, and respectively an obligation of others to such an external intervention. It is difficult, however, to see how a sovereign entity could be held to accept external intervention aiming at re-establishing its sovereignty on grounds of its very own sovereignty, while this sovereign entity could be exempted from a duty to intervene outside of its own frontiers or competences although it could protect those very rights in other sovereign entities much better than the direct sovereign authorities themselves.[219] What also needs to be established is which justification could be given to the use of force in those cases. In the case where the use of force is necessary, but also in all cases of external intervention into the sovereignty of a State, it is important to foresee a multilateral procedure for intervention decision-making on the model of the United Nations Security Council, together with a collective mode of intervention.[220]

### *C. Sovereignty* qua *a-criterial concept*

The third condition for sovereignty to be identified with an essentially contestable concept is its *a-criterial* nature, that is to say the absence of

*Maastricht-Urteil*, the Court rejected that argument on the grounds that no *fundamental* sovereign competence had been transferred (Judgement of 1993 BVerfGE 89, 155). This seems to indicate a distinction between ordinary *transferable* competences of sovereignty and more *fundamental* competences which cannot be transferred at all.

215 See Weiler, 1997, 112 ff; MacCormick, 1999, 135.

216 See Maduro, 2002 for the similar idea of competition among national and European democracies, and on European citizens' right to choose their democratic polity within the EU.

217 See Thürer, 1996 on 'failed states'. The idea of 'failed sovereign' seems to capture the problem more adequately in a post-Westphalian world where states are no longer the only political entities in charge.

218 See Annan, 1999, 6: 'Sovereignty implies responsibility, not just power.'

219 On the obligation to intervene as an intrinsic element of sovereignty, see Shue, 2004.

220 See Shue, 2004 and Bull, 1966 on collective intervention as the only legitimate way of limiting a collectively recognized sovereign.

immutable minimal criteria of correct application. The concept of sovereignty has no immutable core criteria that should be given for there to be a sovereign; all its criteria of application can be disputed. In this respect, it differs greatly from other concepts, like 'camel' or 'chair', that are regarded as criterial concepts and whose core is immutable.[221] Disagreement over sovereignty is not limited to conflict over its periphery and applications, since disagreement on its core criteria cannot usually be blamed on a misunderstanding or conceptual confusion.

Of course, disagreement over contestable concepts like sovereignty needs to start on some common ground, but this shared starting point need not be constituted by core criteria;[222] parties can start by sharing paradigms which they can then progressively amend until they have reached new conceptions of the same concept.[223] For instance, control over one's territory[224] and the principle of non-intervention[225] were for a long time the paradigms of state sovereignty; they have now gradually been abandoned and replaced by more substantive paradigms like the protection of human rights.[226] This constant renewal of paradigms explains how the concept of sovereignty can both be the *starting point* and the *outcome* of our debates. Sovereignty enables us to identify what characterizes a common phenomenon, while at the same time allowing for the identification to be questioned and reassessed thus renewing paradigms in the course of discussion.[227]

### *D. Implications of the contestability of sovereignty*

Although essentially contestable concepts like the concept of sovereignty generate much contestation and complexity, their presence and discussion should be *encouraged.* This is not an uncontroversial position to take;[228] some authors have been very critical of the advantages of holding on to the concept of sovereignty[229] and Stephen Krasner has made this position famous by referring to sovereignty talk as 'organized hypocrisy'.[230] It is important to understand, however, that contestability, rather than impoverishing debates, is likely instead to enrich intellectual life and promote tolerance within it.[231] Like other essentially contestable concepts, sovereignty's centrality in political debates increases its contestability,[232] but it is

[221] See Dworkin, 1991, 72.
[222] Contra: Sorensen, 1999, 591 ff.
[223] On these issues, see Besson, 2005b. See on conceptual change *tout court*: Raz, 2001, 171–2. See on conceptual change and sovereignty: Virally, 1977, 180; Reisman, 1990, 869 ff.; Mayall, 1999, 501.
[224] See Schreuer, 1993, 453.
[225] See Jackson, 1990, 6.
[226] See Krasner, 1993, 235.
[227] See Bankowski and Christodoulidis, 2000, 23. See also Kostakopoulou, 2002, 148.
[228] See James, 1999, 457.
[229] See Falk, 2001, 791.
[230] See Krasner, 1999.
[231] See Connolly, 1983, 213. See Arendt, 1973, 220.
[232] See Falk, 2001, 789; Jackson, 1999b, 433; Virally, 1977, 179.

its very contestability that makes it a central and indispensable element of debates over the best allocation of power.[233] In fact, disagreement and conflict are constitutive elements of those concepts, hence the idea of *sovereignty in conflict*.[234]

As a consequence, despite chaotic appearances, it is vital for political and legal discourse as well as the development of sovereignty that debates about it not be censored. It is precisely because sovereignty is a contestable concept that it is important to discuss it rather than set it aside on grounds of indeterminacy.[235] It is through the plurality of conceptions it can give rise to that the concept of sovereignty can play its crucial political role in a changing world; it can both adapt itself to a new reality and stimulate further debate on a better allocation of power.

## VI. THE FUTURE OF SOVEREIGNTY IN EUROPE

### *A. General*

These contentions about the implications of the contestability of sovereignty apply particularly well to the *European context*[236] where the question of sovereignty has triggered heavy controversies for the past fifteen years.[237] This is hardly surprising given that, in 50 years, the European economic integration project has progressively turned into a political and legal construction whose nature is still indeterminate and unprecedented in political and legal history; different degrees of cooperation and overlapping competences between Member States and the European Union, that do not correspond to any of the known political categories, are now in place within the same territory and within the same political and legal community. The Union is neither an ordinary international organization or confed-

[233] See Sorensen, 1999, 604; Falk, 2001, 791; Wildhaber, 1996, 49. See also Besson, 2004a. See more generally Waldron, 2002, 162.

[234] On the importance of disagreement on key political concepts, Mill, 1962, 175. See also Arendt, 1973, 220. On sovereignty, see Bleckmann, 1994, n 42. See also Loughlin, 2003 and Biersteker and Weber, 1996 on sovereignty *qua* social construction and integral part of the political and legal discourse. See also Aalberts, 2004.

[235] See Falk, 2001, 791; Virally, 1977, 195. Contra: Wildhaber, 1996, 24 and 37. One can actually observe a tendency to *conceptual fragmentation* in practice, as people discuss concepts like democracy or human rights individually rather than together under the umbrella of sovereignty.

[236] I have addressed this issue in more detail in Besson, 2000; Besson, 2003a; Besson, 2004a; Besson, 2005a.

[237] Interestingly, by contrast to what has been the case elsewhere, the issue of sovereignty did not raise much controversy in the EU before the early 1990s; the idea of mere delegation of the exercize of national sovereignty to the EU was largely predominant and for a long time EU authorities were reluctant to express their own sovereignty claims. See De Witte, 1998, 281–93.

eration of sovereign states, given its independent decision powers and direct relationship to its subjects[238] nor a federal and sovereign super-State given the absence of a transfer of the Member States' traditional attributes to the Union.[239] Similarly, on a more legal level, the European legal order is autonomous and amounts to more than an international treaty subordinated to national law, but it is not a state-like unified legal order that integrates national legal orders in a hierarchical way. Somewhere in between lies the Union *qua sui generis* post-national and polycentred, but sovereign political and legal construction whose impact on Member States' retained sovereignty is still to be assessed.

Both the Union and the Member States have adopted very clear positions on the issue of the supremacy of European law, but their conceptions do not correspond to each other; each of them regards its authority as absolute, original and supreme and hence as having the *Kompetenz-Kompetenz*.[240] Hence the frequency and degree of constitutional conflicts encountered in the EU in the past fifteen years.[241] Neither the Treaties nor European practice entail a precise division of powers and this trend has not been reversed by the Constitutional Treaty despite important clarifications and an express guarantee of the previously unwritten principle of supremacy of European law in Article I-10. In other words, the constitutional pluralism which characterizes the European legal order *lato sensu* seems difficult to reconcile with traditional conceptions of unitary sovereignty. This does not mean, however, that sovereignty is lost in Europe nor that we have moved beyond sovereignty and need to redefine it. All it reveals is that paradigms of sovereignty have changed and that new conceptions have emerged that conflict with prior ones, thus confirming the essentially contestable nature of the concept of sovereignty.

There are many implications to the contestability of sovereignty in Europe. Most importantly, it allows all sides of the debate to hold on to their conceptions of sovereignty and of its relationship to their respective legal orders. Besides, thanks to the perpetuation of the concept of sovereignty and of the debates it generates, progress can be made without incurring a breach with the past. This state of *collective uncertainty* may

[238] See the exchange between Weiler and Haltern, 1996 and Schilling, 1996a; Schilling, 1996b.

[239] See von Bogdandy, 2000; Schmitter, 1996b. See also the exchange between Weiler, 1998 and Mancini, 1998.

[240] Although EU authorities have always been reluctant to express their own sovereignty claims, the ECJ has been more assertive in its development of the doctrine of supremacy as opposed to sovereignty. See De Búrca, 2003.

[241] See on constitutional conflicts in the EU, Besson, 2003a; Kumm, 1999; Kumm, 2004b; Kumm and Ferreres-Comella, 2004. Kumm does not regard all constitutional conflicts as instances of the *Kompetenz-Kompetenz* problem, although the competence to determine the competence issue underlies all conflicts over fundamental rights or other basic constitutional principles.

therefore be regarded as *intentional* or at least *beneficial* in the European context. Some authors, like Ian Ward or Catherine Richmond, actually emphasize the importance of *preserving the European identity crisis* through perpetuating the contestability of the concept of sovereignty.[242]

### *B. Current conceptions of sovereignty*

So far, and very schematically, there have been three major alternative conceptions of sovereignty in Europe.

To start with, some authors still propound an *absolute and unitary conception of sovereignty* that does not really fit the pluralist European legal reality. According to them, sovereignty on specific matters must belong either to Member States or to the EU, but cannot belong to both, hence the conflicting narratives one encounters on either side of the debate[243] and the 'revolt or revolution' nexus.[244] Unitary accounts of sovereignty in the EU can be divided into two main groups. The first group encompasses mostly national intergovernmentalists,[245] who understand national constitutions as the ultimate legal rule in the EU, or European supranationalists,[246] who on the contrary see national constitutions as subordinated to the European legal order. As to the second group, it encompasses very different authors like Neil MacCormick[247] or Ingolf Pernice[248] who share the common view that although European political and legal reality is pluralistic and calls for a more flexible account of sovereignty, sovereignty remains a unitary phenomenon according to which ultimate decision-making authority ought to be exercised in a one-dimensional way whether at the European or international level.[249] The difficulty with these approaches is, to quote Walker, 'the myopic partiality of simple unitary positions in the face of substantial evidence of growing constitutional

[242] Ward, 1994; Richmond, 1997.

[243] See Maduro, 2003, 502 ff on these two narratives.

[244] See Phelan, 1997.

[245] See among national sovereigntists, Grimm, 1995.

[246] See among EU sovereigntists, Mancini, 1998 and maybe Habermas, 2001.

[247] See MacCormick 1999, 113 ff who seems to have moved away from post-sovereignty (compare MacCormick, 1993) to a more unitary conception of sovereignty under the influence of Richmond, 1997, in defending his 'pluralist monism' or 'soft monism' which accommodates separate legal orders under the monist and sovereign umbrella of international law.

[248] See Pernice, 2002's multilevel constitutionalism in whose framework the ultimate authority remains EU-centred.

[249] Traces of unitary sovereignty may also be found in Joseph Weiler's idea of a European 'conseil constitutionnel' whose main flavour is resolutely European thus prima facie contradicting his principle of constitutional tolerance (Weiler, 1999; Weiler, 2003) or finally, in Mattias Kumm's and Victor Ferreres-Comella's idea of a legal framework of cooperation whose cooperative dimension is undermined by the legal and unitary nature of the framework of cooperation they propose to entrench in the European Constitutional Treaty (Kumm, 2004b; Kumm and Ferreres-Comella, 2004).

plurality', as well as the doubtful 'capacity even of the more complex and sophisticated unitarianism of multi-level constitutionalism and its ilk to sustain robust pluralist political premises.'[250] It is important to emphasize that, contrary to what some have argued, the failure of the unitary model of sovereignty will not be redeemed by the European constitutional exercise. It is possible to reconcile the existence of a Constitutional Treaty and the consolidation of the constitutional legitimacy of the European polity, on the one hand, with constitutional pluralism and the co-existence of both European and national sovereignty, on the other.[251]

In response to the failure of the unitary sovereignty model in the EU, a second group of conceptions of sovereignty emerged. The idea of disaggregation and reaggregation of sovereignty has been brought forward to grasp the poly-centred dimension of sovereignty in Europe. The problem with this kind of *pooled or shared sovereignty*, however, is that by being everywhere, it seems that it is nowhere particularly important.[252] As Walker argues, pooled sovereignty sits 'uneasily with the sense of sovereignty as a unifying and self-identifying claim made on behalf of the polity'.[253] Although many authors have defended a pooled or divided conception of sovereignty at one stage or another from the early 1970s to the early 1990s,[254] most seem to have moved away from it, either to go back to a unitary model of sovereignty or to move towards a resolutely post-sovereign stance.

A third approach dispenses entirely with the concept of sovereignty. After all, the tyranny of statist concepts is a well-known fact[255] and there is no reason why the organization of a post-national polity like the EU should follow the same rules as national polities.[256] The difficulty with MacCormick's and others' claims to *post-sovereignty*, however, lies in their blindness to the essential epistemic and normative role of sovereignty,[257] whether it is attached to states or other sub-national or post-national political entities. Claims to ultimate authority and *finalité* are regularly made by national and EU authorities, be it by the judiciary or other authorities and be it in the form of claims to sovereignty or of claims to identity and self-determination.[258] These claims arise in very diverse regulatory fields such as those of nationality and citizenship acquisition,[259]

[250] Walker, 2003a, 14.

[251] See Craig, 2001; Walker, 2004. See also Kumm and Ferreres-Comella, 2004 on the limits of Art I-10. See also Walker, 2004 on the Constitutional Treaty's limiting effect on the choice between intergovernmentalism (Art I-5), on the one hand, and federalism (Art I-10), on the other.

[252] See De Witte, 1998, 303–3 on the contradictions of pooled sovereignty.

[253] Walker, 2003a, 15.

[254] See, eg, Pescatore, 1970 in the EU and Pogge, 1992 at the global level.

[255] See Shaw and Wiener, 1999, 78 on this 'touch of stateness'.

[256] See MacCormick 1993 and MacCormick 1999.

[257] Walker, 2003a, viii.

[258] See Weiler, 2003, 16.

[259] See Shaw, 2003b; Jessurun D'Oliveira, 1999.

monetary regulation[260] or fundamental rights.[261] Sovereignty is too deeply entrenched in our legal and political language and too prevalent in public debate to be ignored as an object of serious theoretical reflection.[262]

### *C. Cooperative sovereignty in Europe*

If it is true that our conceptions of sovereignty in Europe should not map unitary conceptions of sovereignty too closely,[263] this need not imply a complete rejection of the concept but only a more adequate translation of the concept in the European post-national context. It is possible to opt for a fourth conception that fits current legal paradigms in Europe better and in particular its constitutional pluralism. Sovereignty in Europe could very well be conceived as both *ultimate* and *pluralistic* along the lines of the *cooperative model of sovereignty* mentioned before.[264]

In propounding this approach to sovereignty in Europe, we would retreat from the assumptions of post-sovereignty without giving in to the rigidity of the unitary approach or the false promises of pooled sovereignty. On this model, both national and European authorities retain their sovereignty but in having to be sovereign together, they cannot escape a certain degree of competition, emulation and cooperation which characterizes sovereignty in a pluralistic constitutional order, thus paradoxically fortifying rather than diminishing their individual sovereignties.[265] This conception of sovereignty corresponds to the close cooperation and prevention of conflicts among authorities that one may observe in practice and through which the European legal order was gradually constructed from 'bottom-up' rather than 'top-down'.[266] European law should therefore be understood as the product of discourse and cooperation among the actors of a broad European legal community which encompasses both the European legal community *stricto sensu* and national legal communities.[267]

On this account, the exercise of sovereignty becomes *reflexive* and *dynamic* as it implies a search for the best allocation of power in each case, thus putting into question and potentially improving others' exercise of

[260] See on the French 'Maastricht decisions', Grewe and Ruiz Fabri, 1992; Olivier, 1994.
[261] See the German case BVerwGE 103, 301 of 30.01.1996, NJW 1996 2173 and the ECJ case C-285 and 98 *Tanja Kreil v. Federal Republic of Germany* [2000] ECR I-69.
[262] See De Witte, 1998, 304; Walker, 2003a, 16–17. See already Richmond, 1997, 379–82 for a similar approach to sovereignty.
[263] See Weiler, 2004, 149-152 on these reactionary modern reactions to post-modern *Angst* about the European Union.
[264] See on a similar conception, Magnette, 2000, 155–9, 161–6; Besson, 2003a; Besson, 2003b; Besson, 2004a; Besson, 2005a.
[265] See Virally, 1977, 193; Esher, 1999, 117 ff; Mayall, 1999, 501.
[266] See Besson 2004a, 278. See also Aziz, 2003, 279.
[267] Maduro, 2003, 511–20.

sovereignty as well as one's own. According to Walker's similar conception of *late sovereignty*,

> The interrogative gaze of sovereign authorities may no longer be exclusively directed outwards towards competing or putative sovereign orders, but, in response to these competing claims, and also to the self-organising and self-regulatory claims of communities of practice and interest which do not define themselves as multi-functional polities, may also turn inwards.[268]

### *D. The risks and advantages of cooperative sovereignty*

#### *1. Erosion and duties of cooperative sovereignty*

Even though there are numerous advantages to defending this form of pluralist and cooperative sovereignty, *risks of erosion of sovereignty* through reflexivity and questioning should not be underestimated in the European Union.

Besides the factual and sociological tendency one can observe towards sovereignty's constructive development through pluralism and conflict,[269] the risks of erosion may also be defeated by a normative argument. Cooperative sovereignty implies the emergence of mutual duties of adjustment and cooperation on the part of national and European judicial authorities active in the European legal order. As I have argued elsewhere, the dynamic and reflexive nature of cooperative sovereignty actually matches the existence of independent *duties of coherence* or *integrity* which go further than mere requirements of dialogue and mutual respect.[270] According to the European integrity principle, all national and European authorities should make sure their decisions are consistent in principle with past decisions of other European and national authorities which create and implement the law of a complex but single European legal order. Only so can the European political and legal community gain true authority and legitimacy in the eyes of the European citizens to whom all these decisions apply. Miguel Poiares Maduro derives similar 'harmonic principles of contrapunctual law' from his conception of competitive sovereignty[271] and argues that:

[268] Walker, 2003a, 27.

[269] See Walker, 2003a, 27–30 on the constructive effect of reflexivity. See also Besson 2004a, 275–6.

[270] See Besson 2004a, 260–1.

[271] Maduro, 2003, 524–31. There is a certain amount of circularity in Maduro's account: he justifies duties of coherence on grounds of competitive sovereignty, but argues for competitive sovereignty on grounds of those very duties (Maduro, 2003, 511–20). See by contrast Besson 2004a and Besson, 2005b for a non sovereignty-based justification of the principle of coherence in Europe.

> [European and national] authorities' decisions should not be seen as separate interpretations and applications of European law, but as decisions to be integrated in *a system of law* requiring compatibility and coherence.[272]

These cooperative duties are necessary in a pluralist legal order; they are the limits to cooperative sovereignty necessary to ensure the cooperative nature of sovereignty or 'the limits to pluralism necessary to allow the largest extent of pluralism possible'.[273] This implies that if either national or European authorities do not fulfil their obligations towards the others, the latter should be discharged from its reciprocal obligations.[274] And this demonstrates how, as I have claimed elsewhere, coherence could become the virtue of Europeans' integrated sovereignty, ie the virtue of a community which wants to integrate itself without, however, renouncing its diversity and hence its pluralism.[275] This idea is perfectly captured by Bellamy's account of mixed sovereignty:

> [...] unity is constructed via a dialogue amongst a plurality, with the one being continually challenged, renegotiated and reconstructed as the other evolves and becomes more diverse.[276]

It is important to understand that these duties of coherence and cooperation are *duties of political morality* rather than legal or institutionalized duties. Cooperative sovereignty captures a political reality in which distinct political and legal sovereigns overlap in the same community and territory, thus undermining the idea of a supreme and unifying legal framework of cooperation.[277] Contrary to what MacCormick argues when he opposes radical pluralism to his own soft or monist type of pluralism, however, this does not leave us only with plain politics and negotiation.[278] The commonality of population and territory implies, on the contrary, a joint moral responsibility on the part of all political and legal authorities.[279] And this responsibility encompasses cooperative duties of tolerance, dialogue and coherence among others.[280]

[272] Maduro, 2003, 534 (emphasis added).
[273] Maduro, 2003, 524.
[274] Maduro, 2003, 533-534.
[275] Besson, 2004a, 269.
[276] Bellamy, 2003, 189.
[277] See for a proposal of a legal and unifying institutional framework of collaboration, Kumm, 2004b; Kumm and Ferreres-Comella, 2004. See also, although in another context, MacCormick, 1999 on the international legal framework. See, finally, Weiler, 1999 on a European 'Conseil constitutionnel', although this seems to be in contradiction with his constitutional tolerance principle (Weiler, 2003).
[278] MacCormick, 1999 on radical pluralism.
[279] See Besson, 2004a.
[280] See Weiler, 2003 on the European virtue of 'constitutional tolerance'.

### 2. *Polity legitimacy and benefits of cooperative sovereignty*

Far from being a difficulty, potential sovereignty conflicts implied by the proposed conception of cooperative sovereignty could constitute an advantage in practice. This is because cooperative sovereignty provides the normative framework for the development of a dynamic and reflexive form of constitutionalism in Europe[281] and hence for the *constitutional legitimation of the European polity*.[282] Even if the framework of sovereignty does not exhaust the search for post-national political values and needs to be complemented by the promotion of constitutional values such as political discourse and citizenship in Europe, sovereignty anchors constitutional pluralism and is the inescapable precondition of post-national polity formation.[283] More precisely, the cooperative model of sovereignty presents three *advantages* for the emerging legitimacy of the European Union.

#### a. *Adjudication and taming constitutional conflicts*

Cooperative sovereignty constitutes an inspiring solution for all those who are concerned about the resolution of *constitutional conflicts* in Europe and the way the different jurisdictions control each other's laws' constitutionality.[284] Different ways to settle these conflicts have been brought forward over the past few years and they include dialogue[285] or international and supra-European modes of legal settlement.[286] Duties of cooperative sovereignty and in particular duties of coherence lead authorities beyond mere requirements of judicial dialogue and mutual respect,[287] towards a true European *cooperative constitutional control*.[288]

It follows from what has been said about cooperative sovereignty in the European Union that constitutionality controls, either on the European or the national sides, should be seen as cooperative and reflexive.[289] Sovereignty *qua* question implies that sovereign authorities constantly reflect on the justification of their sovereignty by comparison to that of others over the same population and territory. National and European jurisdictions cannot afford to work separately and with no regard whatsoever

[281] See also Besson 2004a, 278–9; Besson 2003a on other advantages of cooperative sovereignty.
[282] See Bellamy and Castiglione, 2004 on polity legitimacy. See also Maduro, 2002.
[283] Walker, 2003a, 31–2.
[284] See Kumm, 1999, 353, 362.
[285] See Kumm, 1999. See Maduro, 2003's critique of Kumm's early account.
[286] See Weiler and Haltern, 1996; MacCormick, 1999; Besson, 2000.
[287] See Weiler and Trachtman, 1997, 391.
[288] See Besson, 2004a, 277–8.
[289] See Besson, 2003a. See also Aziz, 2003; Kumm, 1999, 369 on what the German Federal Constitutional Court calls the 'cooperation relationship' in the *Maastricht Urteil*.

for the other side's constitutional rules.[290] As a consequence, in case of constitutional conflict, European and national authorities should question the grounds for their sovereignty on the issue at stake and be ready to contest it if required.

According to this integrity-based model of constitutional control, adjudication in Europe could be much more respectful of other authorities' laws and decisions and coherent than it is usually said to be. Most principles and values that are protected on each side are common to all European constitutional instruments and this even more so now that the European Charter of Fundamental Rights is about to become binding through entrenchment in the European Constitutional Treaty. Thus, disagreement about the best way to realize these common constitutional rights and principles enhances the need for cooperation and coherence in protecting them in each jurisdiction. This may be done mainly through a form of mutual or reciprocal interpretation and justification, whether this occurs through a preliminary ruling or not. This approach may actually be confirmed by the recent willingness to cooperate on the part of national courts and the ECJ.[291] In fact, the European Constitutional Treaty is about to reinforce and even extend this framework of cooperation among sovereign authorities by expressly stating the supremacy clause,[292] clarifying jurisdictional boundaries and enhancing human rights guarantees and democratic procedures.[293] Fewer constitutional conflicts should therefore arise in the future, and when they do, it will be on a more informed basis and they should hence become more constructive.

Following the considerations I mentioned earlier about the moral and non-legal nature of cooperative duties, it should be clear why the proposed model of cooperative constitutional control is not to be *translated legally* or *institutionalized* in any way. Establishing rules of priority among European and national constitutional norms in case of conflict, along the lines proposed by Kumm and Ferreres-Comella,[294] is a competence that cannot belong exclusively either to national constitutional law or to European constitutional law. Such rules would undermine the trust and responsibility that characterize the relationships between ultimate national and European authorities. Besides, it is an element inherent to what I referred to as the

[290] See Kumm, 1999, 351.

[291] See Schwarze, 2000; Weatherill, 2002. See, eg, the signal given by the ECJ in Case C-285 and 98 *Tanja Kreil c Federal Republic of Germany* [2000] ECR I-69 and by the German Federal Constitutional Court in the *Bananas case*: BVerfGE 2 BvL 1 and 97 7.6.2000, EuZW 2000, 702. See more generally Besson, 2004a, 277–8 with further references.

[292] See Kumm and Ferreres-Comella, 2004 on the indirect taming impact of Art I-10 of the Constitutional Treaty on the likelihood of future constitutional conflicts.

[293] See Kumm and Ferreres-Comella, 2004 on this prognosis.

[294] See Kumm, 2004b and Kumm and Ferreres-Comella, 2004 for such a proposal.

contestability of the sovereignty threshold that conflicts of sovereignty might occur on any matter of constitutional importance without it being possible to determine those matters in advance nor accordingly to fix them in a common legal rule. As Maduro argues, it is important to leave the *Kompetenz-Kompetenz* issue open in the joint and cooperative enterprise of European constitutionalism.[295]

### *b. Legislation and enhancing trans-European democratic standards*

Another key illustration of the significance of cooperative sovereignty for polity-legitimacy in Europe lies in the competition and cooperation that should prevail among democratic authorities.[296] Since democratic rule is one of the values protected by sovereignty, the exercise of sovereignty *qua* question implies looking for the best level of decision to endow those affected by that decision with the strongest voice and hearing, both on the part of national and European authorities.[297]

This is particularly important in the context of the 'democratic deficit' accusations. One of the central legitimacy deficits in the EU is said to be the democratic deficit due very schematically to the insufficient and at best distant connection between European decisions and popular participation. Rather than follow the misguided approach that aims at establishing state-like and centralized democracy at EU level,[298] potentially based on a unified and homogeneous *demos*, the democratic specificity of the European political arrangement should be seen to lie in the interaction and cooperation among national and European democratic institutions and hence among different national peoples in Europe. Instead of focusing only on the horizontal division of labour in European institutions, the democratic agenda should also be realized in the vertical division of competences in the European political community in general. European democracy can, in other words, be one of the outcomes of the *cooperative and trans-European exercise of popular sovereignty*.[299] After all, there is no one *demos* in Europe, but many overlapping *demoi* whose convergences should be made the most of, but whose divergences should also be respected in a constant dialogue.[300] A differentiated but cooperative exercise of national popular

[295] Maduro, 2003, 522–3. See also Weiler, 2003 on European multilayered 'constitutional laboratories'.

[296] According to Maduro, 2002, this democratic reinforcement function of cooperative sovereignty is actually constitutive of the legitimacy of the European *polity* itself.

[297] See Weiler, 1997, 112 ff; MacCormick, 1999, 135. See also Maduro, 2002 on the *competition* among national and European democracies and the corresponding improvement of national and European democratic standards.

[298] See Mény, 2003; Moravcsik, 2002 for this critique.

[299] See De Witte, 1998; Bellamy, 2003; Maduro, 2003.

[300] See Nicolaidis, 2003 on European *demoi*-cracy. See also Bellamy, 2003, 188–9.

sovereignty might therefore lead to an increase in democratic legitimacy, both at the national and European levels.[301]

Of course, more work remains to be done to ensure the cooperation among national and European democratic authorities in practice. One may mention the necessity to develop a trans-European public sphere and to stimulate trans-European political debates through the promotion of pan-European political parties. An area where cooperative sovereignty could already be said to provide the means to develop a strong trans-European democracy is *European inter-parliamentary cooperation*. The importance of dialogue between parliaments throughout Europe has been emphasized a lot in recent years.[302] A Protocol to the Constitutional Treaty actually establishes a series of measures to strengthen the involvement of national parliaments in EU decision-making which include, for instance, a duty to inform national parliaments, a common code of conduct and an early-warning mechanism in case of non-compliance with the principle of subsidiarity. Besides the advantages of the creation of a European parliamentary public sphere,[303] one could argue that, once information has been exchanged, the legislative outcome, be it national or European, should be affected as a result of integrity duties and be required to speak with a Euro-coherent voice.[304]

The benefits of European inter-parliamentary cooperation could be measured in terms of both national and European democratic legitimacy. Transnational legislative dialogue and mutual comparison could add onto national standards of democratic legitimacy; they could contribute to enhancing the democratic quality of national legislation by introducing a form of double representation of the European *demoi* and hence of double check on national legislation. Moreover, national decisions in Europe are increasingly affected by European, but also by other national decisions in which they have no democratic representation.[305] The application of the principle of European integrity to the European Parliament could help alleviating the democratic deficit that plagues European Parliament's legislation.[306]

[301] See, eg, Weiler, 1995; Maduro, 2002; Mény, 2003 on these national democratic deficits and the possibility of remedying them through cooperative democracy in Europe. This is the case, for instance, of the extension of some national political rights to EU citizens in all member states in which they happen to reside, thus remedying the inclusion deficit in many member states' national democracy.

[302] See Blichner, 2000, 142 ff. See also Miller and Ware, 1996 on national parliaments' perspective and Bond, 1997 on the European Parliament's perspective.

[303] See in particular Blichner, 2000.

[304] See Besson, 2004a, 278–9.

[305] See Maduro, 2002 and Maduro, 2003.

[306] See Habermas, 2001 on this point.

*c. Constitutionalism and reinforcing European constitutional legitimacy*

Cooperative sovereignty reinforces *European constitutionalism* qua *process*,[307] ie the process of constitutionalization of the European Union which started fifty years ago and the outcome of which is currently being reorganized.[308] This process is a cross-disciplinary and cross-institutional one, as it implies different types of national and European authorities[309] in different legal fields that have a constitutional function in a broad sense of the term.[310] In these conditions, the duties of European cooperative sovereignty constitute a form of *European constitutional discipline*. All national and European authorities are reminded by their responsibilities of sovereignty that they are contributing to the gradual constitution or even to the re-constitution of Europe. They therefore have to test their decisions for coherence against other European and national constitutional standards before taking them.[311] This notion of competitive constitutionalism corresponds to Maduro's conception of *competitive sovereignty*:

> On the one hand, European constitutionalism promotes inclusiveness in national constitutionalism both from an external and internal perspective. [...] On the other hand, national constitutionalism also serves as a guarantee against the possible concentrations and abuses of power from European constitutionalism and, at the same time, requires the latter to constantly improve its constitutional standards in light of the challenges and requirements imposed on it by national constitutions.[312]

Of course, this form of constitutional discipline should not be interpreted as a way to disavow the Constitutional Treaty, nor the outcomes of the 2004 IGC. It corresponds more closely, however, to the nature of the European Community and the flexible way in which it has gradually constituted itself in fifty years of integration. The duties implied by cooperative sovereignty ensure a flexible and non-hierarchical cooperation between European constitutionalism and national constitutions.[313] In respecting duties of cooperative sovereignty, European constitutionalism *qua* process promotes the very ideals of respect and tolerance Weiler associates with the European Constitution.[314] Despite its numerous other advantages,[315] a

[307] See Cohen and Sabel, 2003 on constitutionalism *qua* activity rather than *qua* set of enumerated powers and rights. See also Snyder, 1995, 56–9; Snyder, 2003, 62 ff.
[308] For an analysis of the different conceptions of European constitutionalism, Walker, 2004.
[309] See eg Chalmers, 1997, 180; Mortelmans, 1996, 42–3.
[310] See Snyder, 1995, 100 on this point.
[311] See Besson, 2004a, 279–80.
[312] Maduro, 2003, 522–3.
[313] Maduro, 2003, 535–6.
[314] See Weiler, 2003 and Weiler, 2000. See also Besson 2004a, 279–80.
[315] These are among others clarity, mobilization effect, human rights guarantees and important structural reforms. See Craig, 2001 and Walker, 2004.

formal European Constitution should not disrupt this flexible and pluralist constitutional process and take the risk of replacing it with a rigid constitutional order. To do so, European institutions should actively foster the cooperative attitude and deliberation[316] among national and European constitutional authorities that was triggered by the European 'constitutional moment', whether that moment is recognized as such now or later on.[317]

## VII. CONCLUSION

Neither post-sovereignty, nor absolute and indivisible sovereignty in the Hobbesian sense, tomorrow's sovereignty is both identical and different to yesterday's. As it is the reasoned outcome of constant conflict and periodical changes of paradigms, sovereignty is neither the simple reflection of the new European and international reality nor the application of a pre-established concept whose criteria are immutable and risk corseting the post-national order. Both open and closed, the concept of sovereignty frames and stimulates debates that go deep into the heart of what should be the best allocation of power both in Europe and in the global order. As an *essentially contestable concept*, sovereignty is at once a state of affairs, a question pertaining to the nature and justification of that state of affairs and a justification of it. The correct use of the concept sovereignty and hence the correct exercise of authority it implies consists therefore in constantly reflecting and contesting one's use of the concept and hence one's exercise of sovereignty. As such, the question-concept or reflexive concept of sovereignty can be described as cooperative in the post-national constellation where sovereign entities overlap in their claims to sovereignty over the same territory and population. Read together with the principle of subsidiarity, *cooperative sovereignty* implies allocating competences to those authorities that are best placed to ensure the protection of shared sovereign values and principles. Sovereignty's use is both dynamic and reflexive and implies mutual learning and progress in the protection of the values it encompasses, such as the values of democracy and fundamental rights.

In the European context, cooperative sovereignty provides the normative framework for the development of a dynamic and reflexive form of constitutionalism and hence of *constitutional legitimation of the European polity*. It reconciles national and European conflicting claims of sovereignty and the epistemological and normative resilience of sovereignty in the European Union, on the one hand, with constitutional pluralism and the coexistence

316 See Shaw, 2001; Shaw, 2003a.
317 For a discussion of this European 'constitutional moment', see Walker, 2004.

of many different legal orders within the same territory and political community, on the other. Through its duties of cooperation and coherence, cooperative sovereignty countervails the risks of erosion implied by legal pluralism, while also enhancing the legitimacy of the European polity. This can be observed in the context of difficult issues such as adjudication and constitutional conflicts, legislation and democratic deficits and, finally, constitutionalism and the European constitutional moment. In a nutshell, cooperative sovereignty can help in dealing with growing pressure for common European solutions under conditions of increasing diversity. It places conflicts of sovereignty at the centre of European politics, as both an incentive and a means of integration by way of comparison and self-reflexivity. It constitutes therefore the ideal instrument for a pluralist and flexible further constitutionalization and legitimation of the European Union.

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