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A CONSTITUTION FOR EUROPE AND ITS CONSEQUENCES FOR THE CONCEPT OF NATIONAL SOVEREIGNTY

Van Elsuwege Peter

Ghent University, European Law Department
Universiteitstraat 4, 9000 Ghent, Belgium
E-mail: Peter.VanElsuwege@UGent.be

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Introduction

On 18 July 2003 the European Convention adopted by consensus the final version of the „Draft Treaty Establishing a Constitution for Europe". Almost one year later, at the 18 June 2004 Brussels summit, the Intergovernmental Conference finally reached agreement on the EU's new Constitutional Treaty, which is now awaiting a process of national ratifications. An analysis of the Convention discussions and the first reactions to this ambitious document reveal the sensitivity of notions such as „national identity" and „sovereignty". According to one commentator, the EU Constitution „fatally undermines the concept of nation-state sovereignty", which has „put EU Members in the impossible position of choosing between European integration and their own independence." [1] Against the background of this opinion it is obvious that the impact of the forthcoming EU Constitution upon sovereignty, a central and integral concept of national constitutions needs clarification. A basic question of this paper is whether two constitutions, European and national, can co-exist on the same territory without major legal problems. This is particularly important for a country such as Lithuania, which has several constitutional safeguards protecting the republic's sovereignty and independence. According to Article 1 of the constitution Lithuania shall be an independent state, whereas Article 2 proclaims that „sovereignty shall be vested in the People". Moreover, „no one may limit or restrict the sovereignty of the People or make claims to the sovereign powers of the People" (Art. 3). Hence, the question arises whether and how the forthcoming EU Constitution will affect the traditional concept of national sovereignty as laid down in the first articles of the Lithuanian constitution. This paper first analyses the meaning of sovereignty and the evolution of this concept throughout the process of European integration. Furthermore, it identifies limits to the transfer of sovereign rights as laid down by important decisions of national constitutional Courts and examines how the EU Constitution affects the traditional concept of „national sovereignty". Finally, this paper argues in favour of a new interpretation to sovereignty in the context of further European integration.

I. Sovereignty: a socially conditioned concept

A distinction can be made between *external sovereignty* or independence, which means that there is no authority higher than the state, and *internal sovereignty*, which refers to the ultimate authority to make laws within a state. Both are two dimensions of one concept: the holder of external sovereignty is also the holder of internal sovereignty. [2] According to the traditional approach, developed by Bodin, Hobbes, Rousseau and Hegel, sovereignty is indivisible and inalienable. [3] During the period of absolutism, this concept was personalised by the monarch who regarded and treated the state as his private patrimonial property. After the French revolution, the idea that sovereignty is vested in the people spread throughout Europe and continues to constitute the basis of the constitutional orders of most European states. The people can exercise their sovereignty through democratically elected representatives, who have the power of autonomous decision-making. The first exception to this principle was the application of international law in internal legal orders. The Permanent International Court of Justice established in its *Wimbeldon* decision of 1923 that obligations undertaken by states under international treaties do not harm sovereignty but are its attribute. [PCIJ, Ser. A, No.1 (1923) 25].

The creation of the European Coal and Steel Community (ECSC) in 1951 led to a major challenge to the traditional interpretation of sovereignty. Although essentially based on international treaties, this was the first time a number of European countries decided to yield sovereign powers to supranational institutions. The original Member States, therefore, faced the challenge of linking the constitutional principle of popular sovereignty with the establishment of a supranational body, the High Authority, which was entitled to adopt directly binding decisions. France, Germany and Italy all relied on explicit provisions permitting limitations of sovereignty or transfer of sovereign powers to international institutions. These references, introduced in the post-war constitutions of these states, clearly reflected a first modification of the traditional approach to sovereignty. They provided the possibility to join the European Communities on the basis of an ordinary law, without constitutional amendments. The Benelux-states, which did not have comparable clauses in their constitutions, followed the same line and amended their constitutions only after their participation in the ECSC or even EEC.

As new treaties were concluded and more countries joined, the picture of constitutional authorization for European integration became more diverse. Notwithstanding the differences in the mode of authorisation, all constitutions share the basic idea that only the *exercise* of *delimited* sovereign powers can be transferred. From this perspective, European integration seems to be nothing more than the common exercises of sovereign powers attributed to international organisations and is thus only seen as another mode of applying national sovereignty. [4] This flexible approach essentially means that sovereignty can be limited, shared or pooled without being lost. Although many Member States introduced new constitutional provisions in the wake of the Maastricht Treaty, this conceptual approach to sovereignty continues to constitute the constitutional basis for membership. It is, for instance, clearly expressed in Article 88-1 of the French constitution: „The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, *to exercise some of their powers in common*." The question, however, remains whether European integration can still be seen as nothing but the common exercise of sovereign powers. Particularly in the light of further European integration, and the prospective adoption of a European Constitution, new constitutional obstacles will have to be tackled. In order to assess the challenges imposed by the EU Constitution upon the established interpretation of sovereignty, it is necessary to analyse the landmark judgments of national constitutional courts. In particular the German and Danish highest courts have defined forthright criteria delimiting the permissible level of delegation of sovereign powers.

II. National Constitutional Courts: limits to the transfer of sovereign rights

The explained interpretation of sovereignty is based on the assumption that the Member States continue to bear the ultimate authority whereas only the exercise of delimited powers is transferred to international institutions. This presumably means that they can return to the institutions of the State upon termination of the Treaty or some other event in the future. [4, p. 80] This view obviously subjects Community legislation, at least potentially, to national constitutional control. National supreme courts do not accept the thesis that Community law has absolute primacy over national constitutional provisions. [5] They maintain that direct effect and supremacy of EC law is not based on the nature of Community law itself but on the constitutional attribution of powers to the Community institutions. As a result, national courts seek a foundation for these basic principles in their national constitutions. The Italian Constitutional Court gradually recognised that European norms can prevail over constitutional provisions on the basis of Article 11 of its constitution. Yet, it also imposed so-called „counter-limits" in order to guarantee „the fundamental principles of the Italian constitutional order". [6] The German *Bundesverfassungsgericht* applied this doctrine in its famous *Solange* judgments of 1974 [7] and 1986 [8]. Although *Solange II* specified that the protection of fundamental rights at the European level had achieved a degree comparable to the standards set forth in the German constitution and, therefore, rendered a revision of individual EC acts no longer necessary, it did not change the underlying doctrine of constitutional limits to the primacy of European law. This judgment, therefore, did only imply a so-called „peaceful co-existence" but no real harmonisation of the principle of sovereignty with the legal requirements of further European integration.

The limits of this situation became clear with the adoption of the Maastricht Treaty. The far-reaching provisions of the latter, particularly in the monetary field, raised new discussions on the division of competences and the interpretation of sovereignty. Proceeding from its primary task to ensure the proper application of the constitution, the French Constitutional Council maintained that changes to the European Treaties could be accepted as long as they do not undermine essential conditions for the exercise of national sovereignty. It subsequently concluded that the Maastricht Treaty provisions concerning the establishment of an Economic Monetary Policy on the one hand, and a common visa policy on the other, did indeed affect these essential conditions. In addition, the granting of voting rights to EU nationals for local elections was declared to be unconstitutional. Eventually, this judgment led to an important amendment of the French constitution, including an explicit European integration clause (88-1) and specific provisions (Art. 88-2 and 88-3) authorising France to take part in the areas of European integration that had been described as „essential conditions of national sovereignty". A similar method was applied before the ratification of the Amsterdam Treaty, leading to what has been described as a „gradual evaporation" of national sovereignty. [9]

In this context, the question arises as to what extent EU Member States may delegate sovereign powers to keep the notion of „national sovereignty" meaningful. Important judgments of national constitutional courts established a number of criteria to assess the permissible level of European integration. The *Maastricht*-Decision of the German Constitutional Court [10] has become the main point of reference, although many of these criteria were also repeated in the *Maastricht*-Decision of the Danish Supreme Court. [11] Both courts maintained that the Maastricht Treaty did not significantly affect the concept of national sovereignty for a number of reasons. Firstly, the Member States remain the Masters of the Treaties because each new delegation of competences is subject to unanimous approval and ratification under the national constitutional procedures by the Member States (Art.48 EU). Secondly, *Kompetenz-Kompetenz* – the power to decide on the limits to EU

authority - remains to the Member States. The institutions can only act within the powers conferred upon them by the Treaty (Art.7 EC). Member States have transferred limited individual powers, which are specified in a sufficiently clear and foreseeable manner. Thirdly, the Union's competences are mainly limited to the economic field, whereas fundamental spheres of state sovereignty, such as defence, foreign policy and internal affairs, fall under inter-governmental cooperation and require unanimity. Fourthly, democratic legitimacy still predominantly derives from the national level: the delegation of new powers requires national authorisation and governments are accountable to national parliaments. Fifthly, reference was made to the fact that the EU has no legal personality and that Member States can withdraw from the Union. Last but not least, the courts maintain that ultimate supremacy lies in the national constitutions. In combination with the requirement of sovereignty, the German and Danish courts are therefore responsible to control whether the European institutions act within the limits of powers conferred upon them by the Member States. It is noteworthy that this vision is somewhat contradictory to the European Court of Justice (ECJ) decision in *Internationale Handelsgesellschaft,* [12] which implied that even a fundamental rule of national constitutional law cannot be invoked to challenge the supremacy of a directly applicable Community law. Be that as it may, it is obvious that the work of the European Convention forms another challenge to the traditional interpretation of the sovereignty concept.

III. The „Treaty Establishing a Constitution for Europe“ and its consequences for the concept of „national sovereignty“

1. Challenges to the conventional doctrine

The „Treaty Establishing a Constitution for Europe“ has raised divergent reactions. On one hand, there have been statements that this is a new start, calling for an EU-wide referendum. On the other hand, it has also been argued that the drafting of the EU constitution is mainly an exercise of simplification and only confirms the existing situation because the ECJ already stated that the Treaties form „a constitutional charter“. [13] The latter view is particularly dominant in those countries seeking to avoid a ratification referendum, notably the UK and the acceding countries, which have only just held referendums on EU accession. Anyway, it cannot be denied that the EU Constitution affects the above-mentioned criteria set by the national Constitutional Courts. The fact that the Convention decided to draft a real „Constitution for Europe“ challenges the very notion of ultimate state sovereignty because a constitution has been traditionally, albeit not exclusively, associated with a state. Furthermore, the EU Constitution clearly establishes the principle of supremacy: „the Constitution and law adopted by the Union institutions in exercising competences conferred on it shall have primacy over the law of the Member States“ (Art. I-6). This indicates that whereas national courts have regarded national constitutions rather than ECJ case law as the basis for the supremacy of EC law, supremacy will now clearly derive from the EU level. This provision, which only seems to codify an established principle of Community law, provoked intense discussion during the Convention meetings. [14] For instance, while some proposed to delete this provision or to introduce clear references to limiting supremacy to conferred competences, others even insisted on a reference to the national constitutions and the legislative authority of the national parliaments. The EU Constitution also expressly endows the Union with a legal personality (Art. I-7), the absence of which was in the *Maastricht* Decision viewed as one of the guarantees for Member States“ sovereignty.

Besides these changes, the EU Constitution introduces important institutional reforms that strengthen the government on EU-level. For instance, it creates the post of the

European Council President (Art. I-22), thereby abolishing the system of a rotating presidency. It also introduces the posts of the Union Minister for Foreign Affairs (Art. I-28), envisages a European Public Prosecutor (Art. III-274) and foresees the establishment of a common diplomatic service, the European External Action Service (Art. III-296), and introduces the rotation of Commission Members so that all countries would not be represented at the same time (Art. I-26). Furthermore, the EU Constitution reduces the possible use of veto-right – another important aspect of sovereignty in view of the constitutional courts – in tens of new areas, including asylum, immigration and some aspects of criminal law and law enforcement. In fact, a modified form of qualified majority voting will become the rule as of November 2009 (Art. I-25), limiting unanimity voting to a few most sensitive areas. The Constitution also strengthens the EU's role in foreign and defence policy: it provides for the gradual framing of Common Security and Defence Policy (Art III-293); it foresees the creation of the European Armaments, Research and Military Capabilities Agency; and it enables the establishment of closer cooperation in mutual defence. These, together with the introduction of the European Foreign Minister and an EU common diplomatic service, reflects the EU's gradual but consistently increasing presence in core areas of sovereign statehood. The retention of these fields to the national sphere was regarded crucial by the highest national courts. Finally, while the European Parliament's complementary role in the Union's democratic architecture, compared to the national parliaments, was regarded by the highest national courts as a sign that the EU was not evolving into a federal state, the Constitution strengthens the European Parliament by making the co-decision procedure a rule and by endowing the Parliament with the right to elect the Commission President (Art. I-20 and I-26).

2. Limits to the transfer of powers

Whereas the above-mentioned amendments challenge the national constitutional courts“ decisions, other changes strengthen the position of the Member States. The Convention has introduced or left out critical provisions which the national courts and political rhetoric have regarded as important to the retention of sovereignty. For instance, Article I-5,1 explicitly states that „he Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and conditional, inclusive of regional and local self-government. It shall respect their essential State functions, including those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security“ However, paragraph 2 of this provision reveals the limits of this statement: „The Member States … shall refrain from any measure which could jeopardise the attainment of the objectives set out in the [EU] Constitution“.

Article I-11 reveals that „the limits of Union competences are governed by the principle of conferral“ and „competences not conferred upon the Union in the Constitution remain with the Member States.“ Furthermore, the EU Constitution clearly establishes the right to secede from the Union (Art. I-60). The Member States will also continue to be the ultimate „Masters“ – albeit of the „Constitution“ instead of „Treaties“ – because the requirement of ratification under „national constitutional procedures“ of Article 48 TEU was retained. The exception in this respect is where amendments to the Constitution have been ratified by four fifths of the Member States, which will bring the issue to the European Council (Art. IV-443). In addition, the right to veto has been kept in crucial areas of state sovereignty, such as tax, foreign and defence policy. However, it is easier to avoid the unanimity requirement in more fields, as several areas may be moved to qualified majority voting by unanimous vote, without having to undergo the amendment of the treaty and subsequent ratification under the national constitutional procedures (Art. IV-444). On the other hand, the Intergovernmental Conference added a so-called „emergency brake system“ in the fields of

social security (Art. II-173(3)) and judicial co-operation in criminal matters (Art. III-173(3)). This means that when a Member State is of the opinion that fundamental aspects of its social security system or criminal justice system are at stake, it may request that a draft framework law would be suspended. This mechanism thus provides an additional safeguard for those countries that are reluctant to accept decision-making by qualified-majority voting. The EU Constitution also increases the role of national parliaments by giving them a right of information and an opportunity to challenge Commission proposals that do not comply with the principle of subsidiarity. On behalf of their national parliaments, the Member States may pursue the Commission before the ECJ on grounds of infringement of this principle. Finally, it is also important for a state's sovereignty that references to the „United States of Europe" and to a division of competences on „a federal basis", as had originally been proposed, were left out from the final text.

IV. Sovereignty in the 21st century: towards a new interpretation?

Although some important safeguards have been secured for the Member States, the „Treaty establishing a Constitution for Europe" further challenges the traditional interpretation of sovereignty. Sovereignty, however, has been a fluid concept since its creation, adapting over the course of history to a changing social context and new modes of governance. The concept of sovereignty has evolved throughout history, from the absolute sovereignty of a monarch to the idea that sovereignty is vested in the people. The Twenty-first Century has brought about the case for another such adaptation – to leave behind the idea of indivisible and inalienable sovereignty. Most fields of contemporary life have become internationalised, the task of providing for the common good has shifted from the national to trans-national level, supreme authority is now dispersed between numerous regulatory and judicial entities on international, supranational and national levels (eg. EU, UN, Council of Europe, NATO, WTO), and territorial competence boundaries have been overlaid with the functional competence boundaries of international organizations. [15] The challenges to sovereignty have been particularly far-reaching in the context of EU integration. Considering these challenges, some commentators offer new sovereignty concepts, such as „open statehood", others even doubt sovereignty's explanatory value and speak of „late sovereignty" or governance „beyond the sovereign state". [16]

The current process of European constitutionalisation is likely to reinforce this debate. It can be argued that the traditional interpretation of sovereignty is reaching its limits and will be replaced by a new understanding of this concept. In the light of the work of the Convention, it seems that sovereignty is shifting to a higher level. This means that sovereignty is exercised in common by the European peoples – the peoples of Member States jointly hold the ultimate supreme power, instead of each Member State separately based on their particular constitutional provisions. From this perspective, one or few Member States would not be able to reject further steps in European integration when this power belongs to a convincing majority of Member States. This principle is clearly reflected by the introduction of double majority voting as of 2009, which means that not just the majority (55 per cent) of states is required for adopting acts, but these must represent at least 65 per cent of the Union"s population. Another example of this new approach is provided in Article I-104 of the Constitutional Treaty, which introduces the right for one million European citizens to initiate a petition asking the Commission to present a proposal on a subject relevant to the Constitution. Finally, several distinguished European politicians have argued in favour of an EU-wide referendum on the forthcoming EU Constitution. This would imply that this Constitution could enter into force when a majority of the Union's population votes in favour, even when there would be a negative outcome in some individual Member States. This idea seems to be pure science fiction under the present legal

and political situation but nevertheless illustrates the potential of a new approach to sovereignty.

This new interpretation would imply a shift from state sovereignty to popular sovereignty on the European level. Sovereignty, understood in this new way, would help to clarify the relationship between national and European constitutional law. Too often the national constitution and the European constitutional charter are presented as basic documents of two independent legal orders, which operate in a vertically integrated, hierarchical system. [17] This vision necessarily involves a certain level of competition for the ultimate constitutional superiority. National supreme courts have not accepted the thesis that Community law has absolute primacy over national constitutional provisions. They maintain that direct effect and supremacy of EC law is not based on the nature of Community law itself, as established by the ECJ, but on the attribution of powers to the Community institutions on account of national constitutions, which they consider as the ultimate source of law. Although major constitutional conflicts have been prevented, the *Maastricht* judgments clearly revealed the potentially confrontational relationship. The prospective adoption of the EU Constitution and the further steps in integration that it will introduce set the views of national constitutional courts further under pressure and intensify the need to clarify the relationship between national constitutions and the consequences of EU Membership.

The case for a more subtle understanding of sovereignty was made already in the wake of the German *Maastricht*-Decision. This led to a wider recognition that „national law and Community law can no longer be understood as completely separate legal spheres." [18] Instead, the complex interdependence between the national constitutional framework on the one hand and the developing process of European legal integration on the other has been described as a „pluralistic legal order" [19], a „multilevel constitutional system" [20], „*Verfassungsverbund*", or *„espace juridique commun*" [21]. The common characteristic of these concepts is that the national and European constitutional documents are no longer seen as the emanation of two independent legal systems but, rather, as two parts of one „European constitutional order". The latter reflects the interaction between the EU constitutional charter and the national constitutions of the Member States as the *pouvoir constituant's* agreement on how sovereign powers are determined and exercised in the EU's legal space. The eventual adoption of the EU Constitution provides a unique opportunity to develop this concept.

Conclusion: Towards a real European Constitutional Order?

Every new step in the process of European integration provoked a number of constitutional challenges. Apart from finding an appropriate constitutional basis for membership of a supranational organisation, the primacy doctrine developed by the European Court of Justice obviously triggered the national constitutional courts to find a solution in order to allow the full reception of Community law within its domestic legal order. The outcome has been a flexible approach to sovereignty. In this view, sovereignty can be limited or shared without being lost. Although this interpretation managed to prevent major constitutional conflicts, there is no guarantee that this will continue. The Maastricht and Amsterdam judgments of the German, Danish and French constitutional courts clearly revealed the potentially confrontational relationship between national constitutional law and European Community law. They all confirmed the premise that the national constitution continues to be the ultimate source of law. Whereas this interpretation is completely in line with the traditional vision on sovereignty, it does not fit with the doctrine of absolute primacy of EC law as established by the ECJ in *Internationale Handelsgesellschaft*.

Heated discussions within the Convention revealed the limits of this situation. Although it has sometimes been argued that the drafting of a constitutional treaty only confirms the

acquis jurisprudentiel a number of issues under discussion obviously challenge the traditional attitude of national constitutional courts towards European integration. The forthcoming process of national ratifications, therefore, presents „a window of opportunity" to clarify the relationship between national and European constitutional law. It can be argued that both legal systems are constituent parts of the same European constitutional order. The challenge, of course, is to clarify this complex network of overlapping and interdependent dimensions. A pluralistic conception of European constitutional law suggests that the highest court within each subsystem retains „interpretative competence-competence". In other words, the ECJ will have the ultimate power to interpret the norms of Community law whereas the national constitutional courts continue to interpret national constitutional norms. This essentially means that „no one has the final word: each legal system (national-EU) has, indeed, only the final word within its own sphere of competence".

This post-modern vision of the European constitutional order appears, at least on the surface, to exclude the possibility of conflict. It is, after all, a basic feature of the pluralist position to distance itself from the discussion whether the ultimate authority within the European legal order belongs to the national constitutional courts or the ECJ. Instead, the focus is on the prevention of such conflicts through enhanced co-operation and interaction, both in a vertical (between the ECJ and the national courts) and a horizontal (between the national courts of the Member States) direction. Nevertheless, differences in interpretation and judicial decision-making cannot completely be ruled out.

A major prerequisite to talk about a genuine pluralistic European legal order is primarily related to the recognition of this multilevel system in both the national and European constitutional charters. The point is that the traditional basis for EU Membership focuses too much on the national legal order and continues to see the EU as a more or less traditional international organisation without making explicit reference to the wide-ranging consequences of European integration. In order to enhance the transparency and legitimacy of the European legal order, national constitutions should more visibly recognise the dual exercise of popular sovereignty, as democratic legitimacy is exercised both on the national and European level.

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Europos Konstitucija ir jos padariniai nacionalinio suvereniteto sampratai

Doktorantas Peter Van Elsuwege

Gento universitetas, Belgija

SANTRAUKA

Straipsnyje gilinamasi į įvairius suvereniteto sampratos aspektus. Straipsnio autorius apžvelgia istorinę suvereniteto sąvokos raidą nuo Ž. Ž. Ruso laikų iki šių dienų. Autorius, remdamasis neseniai paskelbtu oficialiu ES konstitucinės sutarties projektu, labai detaliai aptaria galimas ES Konstitucijos pasekmes nacionalinio suvereniteto doktrinai. Keliami aktualūs klausimai, susiję su Lietuvos, kaip naujos ES valstybės narės, suverenitetu. Nagrinėjami kiti probleminiai ES suvereniteto aspektai, susiję su mažomis Europos valstybėmis, kurios neseniai atgavo savo nepriklausomybę. Autorius filosofiniu požiūriu aptaria nacionalinio suvereniteto sąvokos išplėtimo pranašumus ir trūkumus, taip pat analizuoja nacionalinio suvereniteto ribų nustatymo galimybes remiantis nacionalinės konstitucijos nuostatomis. Siūlomi ir problemų sprendimo variantai: autoriaus nuomone, šiuolaikinė konstitucinė teisė suvereniteto ribojimo galimybes sieja pirmiausia su konstitucinių teismų pozicija šiuo klausimu. Todėl tolesnė suvereniteto ribojimo problema ir jos sprendimo būdai gali būti išspręsti tik konstitucinio proceso keliu.

Nemažai dėmesio skiriama Lietuvos Respublikos konstitucinėms problemoms, nagrinėjamos atitinkamos Lietuvos Respublikos Konstitucijos nuostatos, tvirtinančios nacionalinio suvereniteto koncepciją.