# The Limits of Sovereignty Pooling: Lessons from Europe

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## 1. An evergreen problem re-exposed

Both the role and evolution of sovereignty in the constitutional order of the European Union have always been considered key questions of European integration literature.[1] Much has already been said on the possible political scenarios and several debates have emerged about the future of sovereignty during the last decades.[2] This chapter, on the one hand, subscribes to this line of thinking, but, on the other, it also tries to develop an account that at least partly deviates from the "norm". In essence, it submits that some classical tenets of European sovereignty discourse are in need of revision in the light of the latest, and often unfavourable, European developments.

The concept of sovereignty pooling, as elaborated by Robert Keohane, is among the key components of this discourse. It is based on a qualitatively new interpretation of sovereignty as a general political phenomenon and has a strong explanatory potential with respect to the genesis and evolution of European integration and the formation of its unique constitutional architecture. However, the recent crisis starting with the European public debt problems in 2009 and resulting in fierce political controversies over the handling of the influx of migrants uncovered the weaknesses of this strategy. Thus, this concept – sometimes regarded as the main factor in the overwhelming success of European integration[3] – needs to be re-examined in order to better understand its very nature and inherent limits.

In order to foster a critical understanding of sovereignty pooling, this chapter argues that the operation – and, therefore, the success – of this strategy for coordinating state behaviour is strongly – and to a surprising extent – political culture dependent. That is, the more political are the goals to be achieved via sovereignty pooling, the less chance there is to realize them in a political culture that remains strongly buttressed by an overarching claim and a strong respect for sovereignty as the highest level political status of a community. Needless to say,

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[1] For a classic account see JHH Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403.

[2] For mapping this discussion see N Walker (ed.), *Sovereignty in Transition* (Oxford, Hart Publishing, 2006).

[3] The general thrust of Keohane's classic article: RO Keohane, 'Ironies of Sovereignty: The European Union and the United States' (2002) 40 *Journal of Common Market Studies* 743.

European political culture is still heavily reliant on sovereignty at both the level of political rhetoric and that of constitutionalism.[4] Thus, sovereignty pooling seems to be inherently limited by the general settings of political culture, and, therefore, it cannot be regarded as a universal and value neutral strategy to cope with harmonization of various sovereignty claims in a given supranational structure. The cultural embeddedness of this idea must always be taken into account when applying it as potential cooperation strategy for possible regional integrations.

To argue for this unconventional thesis the chapter is divided into three major blocks. The first will offer critical analysis of this concept based on Keohane's classic article. This aims to provide an introduction to the conceptual bases – not apparent at some points – of pooled sovereignty with special regard to its relation to the traditional understanding of sovereignty and the reasons for justifying such an unconventional approach. The second will reflect the earlier conceptual points onto the *sui generis* governance model of the European Union and explains that it is pervaded by the idea of sovereignty pooling to a continuously broadening extent. Certain examples from the recent institutional setting will be also discussed to give a realistic view on the functioning of this strategy. And last, the third, concluding, block will attempt to analyse the repercussions of the current European political crisis with regard to the probable failures of the idea of sovereignty pooling at certain dimensions of European Union constitutionalism.

## 2. Keohane's idea of pooled sovereignty

### 2.1. Sovereignty and the emergence of a modern state: an inextricable relationship

Since 1576, when Jean Bodin published his (in)famous *Six livres de la République*[5] the term sovereignty has constantly been in the centre of various – mostly political, legal, constitutional, and international – controversies. These debates and the transformations in the perception of sovereignty – for its subjects and scope – during the centuries had already been

[4] For example: one of the leading French manuals on constitutional law discusses power and state power in a very elaborate chapter in which the analysis of sovereignty also plays an important role. See F Hamond and M. Troper, *Droit constitutionnel*, 33e édition (Paris, LGDJ, 2012) 85–206, spec. 194–202.

[5] J Bodin, *Les six livres de la République* (Paris, Gérard Mairet, 1583). Chapters VIII and X. In general, Bodin argues that "La souveraineté est la puissance absolue et perpétuelle d'une République (…)" and "J'ai dit que cette puissance est perpétuelle, parce qu'il se peut faire qu'on donne puissance absolue à un ou plusieurs à certain temps, lequel expiré, ils ne sont plus rien que sujets". On the absolute nature of sovereignty Bodin points out its totally unconditional nature: "Aussi, la souveraineté donnée à un Prince sous charges et conditions, n'est pas proprement souveraineté, ni puissance absolue (…)". See: ibid. 111, 112 and 119.

well documented;[6] moreover the denial of sovereignty as such is also a part of the European political and academic thinking.[7] All in all, one may argue that sovereignty as a core concept has a more than four centuries long history in Europe, that is, considering it as an outstanding component of the European political tradition is definitely not an exaggeration.

However, largely because term of sovereignty has never remained within the boundaries of the pure academic discourse but has widely been used to justify or oppose practical, often contradictory, political claims, on both national and international levels, its basic or elementary meaning seems almost to have passed into oblivion. Thus, the first step in making ourselves familiar with the European tradition of sovereignty is to detach this core meaning from the layers of interpretation accumulated in the course of subsequent scholarly and political discussions. Indeed, the later intellectual turbulences are secondary from our respect, as they have been propelled by ad-hoc and age-dependent political interests.

It can hardly be questioned that Michael Oakeshott – as a historian of political ideas – is among those scholars who accurately identified the core of sovereignty in the context of modern European political history as he interpreted it in its proper historical context: the birth and formation of the modern state, the emerging unit of governance in post-medieval Europe. Thereby, he created a historical and descriptive – i.e. not value or interest biased – understanding of sovereignty as an essentially historical phenomenon.

In Oakeshott's view sovereignty has to be associated with the emergence of the modern state, that is, its roots go back to the era of early modernity. In fact, it is a necessary political precondition for the formation of the modern state characterized by a single governing authority in contrast to the multifaceted and fragmented exercise of political and coercive power in the Middle Ages.[8] In addition, the emergence of this single – sovereign – governing authority cannot be separated from the power potential of modern states based on the monopoly of coercion as well as the efficiency of bureaucracy.[9] Oakeshott uses the Latin terms of *potestas* and *potentia* to shed light on the historical uniqueness of the modern state with respect to its unprecedentedly strong powers as compared to the earlier oscillating forms of European governance components.[10] That is, in a historical sense, sovereignty as a term

[6] For a detailed discussion of the concept of sovereignty and the changes in its interpretation see: H Kelsen, *Das Problem der Souveränität und die Theorie dees Völkerrechtes* (Tübingen, J. C. B. Mohr (P. Siebeck), 1920).
[7] See for instance TJ Biersteker and C Weber (eds.), *State Sovereignty as Social Construct* (Cambridge, Cambridge University Press, 1996).
[8] For the historical details see: N Davies, *Europe. A History* (New York, HarperPerennial, 1998) 291–468.
[9] Cf. Max Weber's idea on the key role of bureaucracy in the emergence of modern state. M Weber, *Staatssoziologie* (Berlin, Duncker und Humblot, 1956).
[10] In the words of Oakeshott: "Now, these characteristics of modern European governments may be summed up by saying that in a modern state: (i) Governing is recognized to be a sovereign activity. (ii) Governments are

refers the unitary and centralised nature of state powers through a single governing authority, and, therefore, the modern state has been the socio-political entity first enabled to use this substantively new set of powers for the achievement of its internal and external aims. The following, centuries-long and multi-level discussion around sovereignty has mainly been dedicated to the problem of approaching and interpreting this phenomenon of political and administrative power concentration from various angles including scholarly differences and ordinary political debates.

### 2.2. Keohane on sovereignty pooling: a deconstruction of a cultural character

So, Oakeshott's view on sovereignty identifying it as the power status of a single political authority offers a perfect starting point to presenting the concept of pooled sovereignty as developed by Robert O. Keohane. In sum, Keohane stresses that the European approach to sovereignty had made a substantive turn in parallel with the emergence of the European Economic Community as it was capable of transcending the traditional view centred on the necessary existence of a single governing authority in internal and international politics. In contrast, the North American approach is attached to the "classical interpretation" coined by Bodin and his followers.[11] Although Keohane's thesis seems to be relatively simple, his line of argumentation is composed of insights that should be discussed in a more analytical way.

As an introductory step, Keohane argues – in line with the contemporary trends of political philosophy[12] – that political thinking is composed of concepts that have no single or permanent meanings, but their interpretations may diverge along with different cultural contexts. Thus, it is argued by Keohane that culture – understood in the broadest sense – has a decisive impact on the meaning of political concepts. And, therefore, the understandings of sovereignty may also diverge as they may be associated with various connotations emerging in dissimilar cultural contexts.[13] Keohane implies here that sovereignty as a concept is heavily

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exceedingly powerful. These features refer, respectively to (a) potestas, the legal authority of governments; and potential, the actual, physical power of a modern government disposes." M Oakeshott, *Lectures in the History of Political Thought* (Exeter, Imprint Academic, 2006) 368.

[11] For a detailed discussion of the formation of the "American" approach of sovereignty see Keohane, 'Ironies of Sovereignty'. 749–754. Interestingly, Keohane points out that the evolution of the concept of sovereignty in the United States had an opposite direction as compared to the European way since at the birth of the US the concept of unitary external sovereignty was an almost unimaginable term partly due to the federal political framework and the autonomy claims of the States, however it begun to take shape around the beginning of the 20th century.

[12] Cf. R Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1. With special regard to the critique of the Archimedean approach of conceptualization.

[13] Keohane, 'Ironies of Sovereignty' 743.

culture dependent; consequently, its cultural embeddedness has always been taken into account when invoking it in a given discourse.

He further points out that at the end of the 20th century Western Europe embraced an ideal of sovereignty that differed fundamentally from the way the concept remained understood in the United States, although both concepts are rooted in the same premise. The earliest appearance of this premise can be found in Bodin's vision, who argued that sovereignty, as the sum of the king's final powers, is undivided and it forms a basis for an ultimate political authority.[14] This kind of absolute sovereignty offered an excellent tool for legitimizing the modern state as a political entity as well as limiting the external actors' practical room for "international" or "interstate" political actions when interacting with another sovereign unit. That is, the concept of sovereignty, as articulated by Bodin, helped to promote and establish order by imposing obvious limits on political behaviour in the turbulent era of pre-Westphalian Europe.[15]

However, in contrast to this common heritage, the understanding of sovereignty on the two sides of the Atlantic had begun to diverge substantially from the post-World War II decades. Basically, the commencement of the European integration process initiated this departure. In Keohane's view the recent distinction between the two intellectual and political poles is due to four major factors: the difference in (i) societies, (ii) political institutions, (iii) national histories and the (iv) geopolitical interest.[16] Therefore, a given account of sovereignty in international politics is a complex interplay of various factors, thus, it cannot be reduced to pure political interests. As it is, the main group of factors certainly has a historic-cultural character since differences in societies, institutions and perceptions of histories always go back to cultural premises.

The European idea of pooled sovereignty means a qualitative novelty with respect to international or interstate cooperation. While the traditional, so to say Bodenian, approach fostered the establishment of a predictable and, therefore more manageable framework for international cooperation by strictly delimiting political units thereby structuring interstate relationships it set forth robust inherent constraints on state cooperation. On the one hand, this approach prevented the final delegation of state powers – sovereign competences – to external authorities by its very nature; and, on the other it also required unanimity in multi-player decision-making processes thereby protecting the sovereign units' final say in their political

[14] ibid 746.
[15] ibid 747.
[16] ibid 746.

affairs. [17] Thus, the classical interpretation of sovereignty lies behind the idea of intergovernmentalism in international affairs.[18] However, the European approach of pooled sovereignty drastically challenges this conventional view on international cooperation as it facilitates the transfer of some competences of final legal authority in some policy fields to the Community – or "common" – institutions with specific individual, therefore supranational, political identity. That is, the formerly indivisible single governing authorities – the Member States – intentionally decided to give up – i.e. pool – their sovereignty in certain policy areas as they recognize and acknowledge that this move is a necessary precondition for acting more efficiently at these fields.

Keohane sharply points out the main motives behind this unconventional, and even irrational according to the classic view, course of state actions resulting in the establishment of a new, supranational level of community institutions with a multitude of individual competences. This was mainly propelled by the recognition that the states participating in the European project had been in an externally and internally interdependent situation in the post-World War II world, therefore, due to rational expectations, the pooling of sovereignty in certain areas may have made them together more efficient than acting alone at these fields.[19] So, in conclusion, socio-economic and political interdependence can create a historical setting where the strategy of pooling sovereignty under the supervision of community institutions may be a favourable political claim for each participant. Even though, this goes clearly contrary to the conventional canon of sovereignty-centred state behaviour.

In addition, Keohane also argues that behind this Copernican turn in coordinated state behaviour a change in the attitude towards sovereignty may also be discovered. He points out that the European idea of pooling sovereignty implies that sovereignty is not a static account of final political powers any more but "a resource to be used"[20] in achieving individual state aims and interests. Thus, sovereignty is not regarded as a *conditio sine qua non* for the very existence of a state in European eyes any more, but a toolkit for obtaining their aims through a system of "co-operative mutual interference". [21] Therefore, the claims based on sovereign competences can freely be used in the interstate bargaining processes when setting up the framework for particular community policies. For instance, the so-called "empty chair crisis"

[17] Cf. ibid 748.
[18] For an excellent account of the features of intergovermentalism in the context of the European Union see SC Sieberson, 'Did Symbolism Sink the Constitution? Reflections on the European Union State-Like Attributes' (2007) 1 *U. C. Davis Journal of International Law and Policy* 5–16.
[19] Keohane, 'Ironies of Sovereignty' 748.
[20] ibid 749.
[21] ibid 749.

which started in 1965 exemplifies the extent to which sovereignty claims could be used to shape the institutional setting of the Community along with particular national interests, but to not endanger its very, embryonically supranational, nature.[22] Here, by vehemently referring to French sovereignty in the context of the Common Agricultural Policy and obliging the French representative to leave the Council of Ministers, De Gaulle essentially created the basis for such a political compromise in decision-making that made it possible to defend "vital national interests" and preserve the achievements of the qualified majority voting system in certain important policy areas at the same time.[23] Thus, in the political life of Community sovereignty started to lose its meaning as a country's final political power *status* – remember at this point Oakeshott's definition –,[24] and was gradually transformed into a strong argument for backing the Member States' individual policy preferences when cooperating with other Member States and Community institutions.

In addition to providing an excellent description of the phenomenon of pooled sovereignty and mapping the major incentives behind it, Keohane also sets forth some normative insights. Namely, he reflects on the ways to assess this transformation and how to learn from it in world politics. First of all, he argues that even though the European Union cannot be treated as a universal model for supranational integrations due to the uniqueness of political and cultural factors in the background of this development, its success has an obvious message for the world;[25] implying that successful interstate cooperation can be established without overemphasizing state sovereignty claims as these may be tamed through supranational institutional innovation efficiently. That is, if a country is willing to pool certain pieces of its sovereignty it is certainly not a sign of political weakness but that of "strength and self-confidence".[26] Thus, sovereignty must not be regarded as a matter of "all or nothing", a zero sum game as it were, but as a phenomenon with numerous layers and components that can freely be ceded when bargaining for common institutional frameworks that increase the potential of all participating actors.

Furthermore, Keohane also puts serious emphasis on the conclusion that if one considers sovereignty in such a way, this entails a serious decrease in the political value of an imagined,

[22] For an in-depth analysis see J Ziller, 'Defiance for European Influence – The Empty Chair and France' in A Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford, Oxford University Press, 2017) 422.
[23] On the Luxembourg compromise see: K Lenaerts and P van Nuffel, *Constitutional Law of the European Union* (London, Thomson, 2006) 420.
[24] Cf. J Austin, *The Province of Jurisprudence Determined* (London, John Murray, 1932) 199–201.
[25] Keohane, 'Ironies of Sovereignty' 755.
[26] ibid 755.

and strongly desired, full sovereignty *status.*[27] At that point, the attainment of full and perfect sovereign competences loses its urgent political relevance as the use of the pre-existing fragments becomes much more relevant in political terms. That is, the European success of pooled sovereignty suggests that attraction of the idea of full and absolute sovereignty may fade away in a mutually interdependent political and economic context.

Lastly, Keohane also identifies a major precondition for embracing the idea of pooled sovereignty. He argues that this way of cooperation strategy can only be successful and legitimate in the eyes of the participants if "one's practices are in harmony with the partners' expectations".[28] Thus, a higher level of political trust is a necessary prerequisite for the emergence of an approach of sovereignty which accepts that certain components thereof are, for any reason, to be pooled via a common institutional structure. Apparently, a common understanding among the participating states based on a shared historical and cultural memory may definitely facilitate the formation of such mutual interstate trust. Nobody can deny that the openness towards and understanding of other actors' expectations are also deeply rooted in cultural experience, and indeed may even be regarded as cultural questions.

### 2.3. Assessing Keohane's idea

In its entirety, Keohane's concept is logical and coherent. It originates from the recognition that the emergence of the European Community decisively – and partly invisibly – transformed the understanding of sovereignty in Europe from the 1950s, while the US political thinking is still strongly attached to the classic, Bodinian, interpretation. In the background of this renewal process one can identify two major impetuses. First, cultural differences reflected in the social, political and historical perceptions of the Continent resulted in such a renewed understanding and, second, this process was also facilitated by substantially diverging geopolitical interests (the re-unification of the Western World), too. In sum, the effect of cultural and geopolitical factors moved the Continent's view on sovereignty away from the classic pattern.

However, the scholarly novelty of Keohane's intellectual construction may be explained more lucidly through comparing it with the main trends of the intensive European sovereignty debates that are directly or indirectly attached to the birth of European Union

[27] ibid 756.
[28] ibid 760.

constitutionalism. Contemporary assessments of European sovereignty debates[29] have already made laborious attempts at structuring this diverse and colourful discussion. In Byers and Sinclair's eyes both a purely theoretical and an "integrationist" line of discussion about sovereignty have been taking place on the European scene in the last decades. The former is focused on either the specificities of sovereignty [30] or the taxonomy of its various appearances,[31] while the latter tries to assess its relevance from the aspect of the European integration process as well as the emerging European polity. [32] These pieces revealed interesting insights and points with respect to the possible roles of sovereignty in such a *sui generis* constellation of interstate integration, however, this discourse has been unable to recognize what has already been uncovered by Keohane in a convincing way. Keohane points out that the general understanding of sovereignty has qualitatively been changing in Europe and, compared to this, the further, even insightful, nuances of taxonomy – as for instance: differentiating between sovereignty as a concept or phenomenon, then subdividing it as a phenomenon into legal and political categories[33] – may acquire only secondary importance. It seems that many European scholars are lost in the very details and, therefore, they appear unable to grasp the essence of the transformation. Naturally, this may be due to their internal, European, and often deeply involved, perspective. One of Keohane's main scholarly advantages is definitely his external position as compared to the European disputes.

Keohane's idea and the concept of pooled sovereignty as such, was directly challenged by Samantha Besson by introducing her concept of cooperative sovereignty. The idea of cooperative sovereignty is more than a simple criticism of pooled sovereignty as it points to a real – but manageable – deficiency in Keohane's idea. Basically, as it is argued by Besson, the concept of pooled sovereignty only reflects a unidirectional relationship between the Member States and the Community's institutional architecture, that is, it acknowledges that Member States pool certain competences from their sovereignty to ensure the efficient functioning of Community institutions, however it is unable to handle the other side of the coin: by creating such kind of sovereignty pools in certain policy areas the Community institutions also acquire

[29] See S Besson, 'Sovereignty in Conflict' (2004) *European Integration online Papers* Vol. 8 N° 15; eiop.or.at/eiop/texte/2004-015a.htm 6–12. M Byers and A Sinclair, *American and European Conceptions of Sovereignty: Two Sides of the Same Coin.*
www.sussex.ac.uk/webteam/gateway/file.php?name=byers-sinclaironsovereigntyaug20072&site=12, 50–73
[30] Cf. N MacCormick, *Questioning Sovereignty* (Oxford, Oxford University Press, 1998) 123–126.
[31] See for instance A Hasenclever et al., 'The Future of Sovereignty: Rethinking a Key Concept of International Relations' (1996) *Tubinger Arbeitspapiere zur Internationalen Politik und Friendensforschung*, Nr. 26., 1–13.
[32] See for instance W Wallace, 'The Sharing of Sovereignty: The European Paradox' (1999) 48 *Political Studies* 503.
[33] For details: Byers and Sinclair, *American and European Conceptions of Sovereignty* 55–56.

some sovereign or sovereign-like competences. By doing so, it establishes a power relationship with two poles in which the Community actors also have a certain, obviously incomplete, but still extant, sovereign *status*.[34] The idea of a "pluralistic constitutional order" developed by European constitutional law scholarship is underpinned by the recognition of this phenomenon: the complex interplay between the two levels of sovereigns.[35]

Besson suggests, that due this deficiency of the idea of pooled sovereignty, the *status quo* of the European constitutional architecture can much more plausibly described by relying on the concept of cooperative sovereignty. In fact, she argues that the *de facto* existence of sovereignty may only be preserved in this pluralistic order if cooperative duties underpin the running of the whole "system". That is, she is deeply convinced that the existing sovereign units in the Community – on the level of both those of the Member States and the Community institutions – have a strong obligation to cooperate as the pluralistic nature and the equilibrium of this order may only be safeguarded this way.[36] However, at this point, she suddenly changes the quality of her argumentation as she slides from the earlier descriptive perspective to a normative one.

First of all, she sets forth that "it is important to understand that these duties of coherence and cooperation are duties of political morality rather than legal or institutionalized duties".[37] Second, she also submits that cooperative sovereignty only works in a community that has a constant intent to continue integration towards a more advanced level.[38] Needless to say that these normative premises cannot really be managed with a *realist* attitude[39] as the last years in the history of European integration revealed that Member States are always willing to set aside moral duties, including the duty of sincere cooperation, if their specific national interest is at stake.[40] And, if one detaches this moral and normative element from the concept of cooperative sovereignty, what remains is the idea of pooled sovereignty with the important addition that Community institutions, and the Community itself, may also behave as

[34] Cf. Besson, "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." Besson, 'Sovereignty in Conflict' 18.
[35] Clearly, the term sovereign is not used in the usual way here, but in the context of sovereignty pooling.
[36] Besson, 'Sovereignty in Conflict' 19. Cf. this argument with Daniel Halberstam's point emphasizing the need for both constitutional and extra-legal (structural, popular and political) constraints for the effective functioning of federations. See: D Halberstam, *Federalism: A Critical Guide*. 27–28. Available at SSRN: ssrn.com/abstract=1924939.
[37] Besson, 'Sovereignty in Conflict' 19.
[38] ibid.
[39] Cf. HJ. Morgenthau, *Politics Among Nations. The Struggle for Power and Peace* (New York, Alfred A. Knopf, 1985) 3–17.
[40] For a detailed analysis on the role in and effect of national interest on EU law in general, see M Varju, *Between compliance and particularism: Member State interests in European Union law*, Manuscript. Available at hpops.tk.mta.hu/uploads/files/MSInterestsYEL.pdf

sovereign-like entities. This is a logical consequence of a strategy that was ignored by Keohane while focusing solely on the Member State dimension of sovereignty pooling.

## 3. Sovereignty pooling in EU constitutional law

Apparently, sovereignty pooling as all the general political concepts embraces a wide range of connotations and implications: from pure political theory, through the justification of political claims and considerations, to a number of issues related international and constitutional law. Therefore, this chapter narrows the scope at this point as it will discuss one single component of this variety of issues: the rise of provisions in the law of the European Union that paved the way towards a constitutional framework for sovereignty pooling. By doing so, it will miss many valuable insights that may derive from the analysis of the political side of sovereignty pooling, but it is hoped that it provides such a sharp and precise analysis that may give rise to further interest.

It is submitted by Paul Craig that the precise "configuration of power sharing" within the European Union – that is the real power relationship between the Union itself and the Member States – may only be determined if treaty provisions on both competences and precise decision-making – sometimes hided in the TFEU – are read together.[41] Based on this insight, one may argue that the rules about division of competences are the "static" side of Union decision-making, in general, as they provide a conventional frame to channel the co-operative power exercise between the Member States and the Union, whereas the precise rules of decision-making are to be regarded as the "dynamic" dimension since they enable the actors to come to successful agreements on political or policy issues. Undoubtedly, qualified majority voting (thereafter: QMV), regardless the specific configuration of voting, has a crucial role from the aspect of pooled sovereignty in decision-making. The option of QMV can make the whole idea of sovereignty pooling functioning in reality as it enables the decision-makers – the Member States in general – to overstep peculiar individual political interests thereby empowering all the actors to make agreements in line with the interests of the entire community.[42]

In the following, this chapter examines how and to what extent the constitutional law implications of the idea of sovereignty pooling emerged and appeared in the course of the

[41] P Craig, 'The Lisbon Treaty, Process, Architecture and Substance' (2008) 33 *European Law Review* 147.
[42] Cf. A Moravcsik, *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht* (Ithaca, New York, Cornell University Press, 1998) 67.

European integration process. The main point submitted here is as follows: sovereignty pooling has always been an underlying principle of the community toolkit of establishing its constitutional architecture though it had been almost unnoticeable in the early period of integration. In addition, the actual – post-Lisbon – configuration of competence-sharing and broad range of QMV decision-making are logical consequences of the earliest intents of sovereignty pooling.

### 3.1. The early phase of sovereignty pooling in European Union law: the idea in embryonic form

Unsurprisingly, the question of how to avoid the political traps of unanimity decision-making when community interests are at stake had already been an important issue when drafting the future provisions of the treaty on the European Economic Community. As for instance, Paul Henri Spaak passionately argued that "unanimity formulae are the formulae of impotence", and he suggested that "the ancient notions of sovereignty" had to be transcended by the introduction of the principle of majority voting in general.[43] However, contrary to all these considerations, unanimity voting was placed in the centre of community decision-making at the moment of founding the Community in 1957, mostly because of simple pragmatic political reasons.[44]

Nevertheless, the treaty-makers also left the door open to QMV, that is, for the realization of sovereignty pooling at certain, limited but important, policy fields. The Treaty of Rome itself scheduled the phasing-in of QMV in community decision-making from 1965. In theory, in almost 40 areas of Community activities had to be decided by way of QMV from 1965: mostly budgetary affairs, competition and commercial policy segments, and Common Agricultural Policy decisions were those areas where the Community decided to introduce QMV decision-making to replace the previous unanimous decisions.[45] Significantly, this extension of QMV procedure to sensitive policy areas, such as agriculture, was unacceptable at that time in the eyes of the French political establishment, and gave rise to the most serious crisis in the history of the Community: the so-called "empty chairs" crisis.[46] The six months

[43] See SC. Sieberson, 'Inching Toward EU Supranationalism: Qualified Majority Voting and Unanimity Under the Treaty of Lisbon' (2010) 50 *Virginia Journal of International Law* 933.
[44] For the background see: R McAllister, *From the EC to the EU. A Historical and Political Survey* (London and New York, Routledge, 1997) 12–22.
[45] For the complete list see: V Miller, 'The Extension of Qualified Majority Voting from the Treaty of Rome to the European Constitution' (2004) *House of Commons Research Papers*, 7 July 10–11.
[46] Cf. Ziller, 'Defiance for European Influence'.

during 1966 while France boycotted community decision-making sharply brought into relief where the inherent "cultural" limits of pooling sovereignty in Europe were at that time. But, and this is the most telling point from our point of view, even the fierce opposition by De Gaulle was insufficient to discredit the idea of QMV and sovereignty pooling in the name of a putative complete sovereign *status*. The Luxembourg compromise, providing a *de facto* veto in QMVs if a "vital national interest" is concerned, besides all negative consequences resulting in the standstill and politically frozen but institutionally developing decades of the next period of "Eurosclerosis",[47] made the survival of the idea of sovereignty pooling and its most important symbol, QMV, possible.

Moreover, besides all political stalemates in the 1960s and 70s, the European Court of Justice (thereafter: ECJ) had started to develop the community architecture towards a more supranationalist framework in an almost invisible way. The establishment of the principles of direct effect[48] and supremacy[49] as well the birth of the doctrine of implied community powers[50] all reinforced the idea of sovereignty pooling in practice. These developments intentionally limited the scope of Member States sovereign competences by federal type constitutional law solutions almost exclusively in relation to the completion of the common market.[51]

As for the clarification of Community competences – the "static" dimension of sovereignty pooling – the ECJ also made a considerable contribution from the seventies. Originally, the Treaty on the European Community did not contain any specific competence clause suggesting a federal solution,[52] but it dominantly applied the terms "task",[53] "purposes",[54] "activities",[55] "limits"[56] or "powers conferred upon"[57] when delineating the areas of community action. This set of terms on the activities of the Community had a rather "open-

[47] For an insightful discussion of this period in the history of the European integration see A Awesti, 'The Myth of Eurosclerosis: European Integration in the 1970s' (2009/3) *L'Europe en formation*, 2009/3, 39–53.
[48] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.
[49] Case 6/64 *Flamino Costa v ENEL* [1964] ECR 1339. 594.
[50] Case 22/70 *Commission of the European Communities v Council of the European Communities* [1971] ECR 263, para 28.
[51] Cf. Weiler, 'The Transformation of Europe' 2410–2431.
[52] Compare for instance The Austrian Federal Constitution articles 10–15.; the Constitution of Belgium articles 74 and 77.; the Basic Law for the Federal Republic of Germany articles 70–75.; and the Constitution of the United States article I 8–10.
[53] Art. 2 TEC.
[54] Art. 3 TEC.
[55] Art. 3. TEC.
[56] Art. 5. TEC.
[57] Art 5. TEC.

textured"[58] character – as it is argued by Joseph Weiler[59] – therefore the ECJ was given ample room to further interpret and determine the real scope of Community competences. Unsurprisingly, in some cases, the ECJ argued for the exclusive nature of Community competences if these were vital for the smooth functioning of the economic community. Both the area of common commercial policy[60] and the conservation of sea biological resources were subjected to exclusive community competence by the case-law of the ECJ,[61] and the external competences of the Community were clarified through a rather community-friendly reading.[62] In addition to these developments, as Joseph Weiler points out, the ECJ also started to extend community competences via various sophisticated and less overt methods (namely: extension, absorption, incorporation and expansion)[63] and this line of case-law also forced the melting of sovereign competences at certain policy areas thereby paving the way towards the substantively new understanding of sovereignty that was analysed by Keohane from a political philosophy angle.

In sum, it may be argued that modest but definite steps were taken within the initial political and institutional framework of the Community in the direction of sovereignty pooling from the 1960s onwards. These were rather fragmentary, technical and sometimes even almost imperceptible, but they prove that the intent towards pooling sovereignty had never ceased in the Community even though political pragmatism raised hard constraints in its uncertain course of development. Further, due to the impasse in the political sphere of the sixties and seventies, the ECJ must have played a preeminent role in this process of keeping the idea alive.

### 3.2. From 1986 to the Lisbon Treaty: serious institutional steps towards sovereignty pooling

By the enactment of the Single European Act in 1987 a new phase started in the European history of sovereignty pooling. Although this Act only extended the scope of QMV to a rather limited extent – namely seven community policy areas were changed from unanimity to QMV and five new ones were introduced into the corpus of the EC Treaty, from which the majority

[58] See. HLA Hart, *The Concept of Law* (Oxford, Oxford University Press, 2012) 124–135.
[59] Weiler, 'The Transformation of Europe' 2433.
[60] Cf. Opinion of the Court of 11 November 15 in *1/75, Draft OECD Understanding on a Local Cost Standard drawn up under the auspices of the OECD* [1975] ECR 1355.
[61] Joined Cases 3-4/76 and 6/76, *Cornelis Kramer and others* [1976] ECR 1279.
[62] For a detailed analysis see: R Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (Oxford, Oxford University Press, 2009) spec. 312–320.
[63] For the details: Weiler, 'The Transformation of Europe' 2437–2450.

was directly linked to the functioning of the common market and the future evolution of the internal market[64] – one may convincingly argue that this was the overture to a completely new chapter in the proliferation of QMV in Community decision-making. With the subsequent treaty modifications (Maastricht (1992), Amsterdam (1998) and Nice (2001)) QMV voting was considerably extended to pre-existing policy areas as well as to new community competences which were introduced subject to QMV. In addition, the birth of the initially intergovernmental pillars in 1992 – Common Foreign and Security Policy and Cooperation in Justice and Home Affairs – has also be taken into account as these two new fields of action opened up new potential areas for future QMV decisions considered as core components of state sovereignty by the conventional Bodenian understanding, such as foreign and security policy or refugee and immigration policies.[65] By the modifications of the Nice Treaty only 66 provisions in the Treaties remained subject to unanimity decision-making, a part of these was related to the institutional structure of the Union, while another considerable segment dealt with decisions of a high level of foreign and security policy relevance.[66]

The process of this extension of QMV decision-making in the Union's constitutional architecture was further enhanced with the Lisbon Treaty modifications by the introduction of the so-called ordinary legislative procedure.[67] On the one hand, the Lisbon Treaty subscribed to the former dynamic of shifting from unanimity to QMV procedure and many segments of the institutional issues and policy areas were touched upon by these changes.[68] Further, the Lisbon Treaty also created a previously unknown mechanism to extend QMV decision-making to some new areas; this is the inclusion of the rather unique *passerelle* provisions enabling either the European Council or the Council, with the consent of all Member State parliaments, to introduce QMV for future decisions by a unanimous vote.[69] This unconventional solution is certainly efficient from an institutional aspect, as it makes it possible to further extend QMV without being engaged in any treaty modification process. On the other hand, the Lisbon modifications also incorporated several new areas subject to QMV into the Treaties that were previously outside the scope of community action or were subsumed under the options established by the Article 308 EC, the Community's "necessary

[64] For a detailed list see: Miller, 'The Extension of Qualified Majority Voting'11–13.
[65] For a detailed list see: ibid 13–17.
[66] For a detailed list see: ibid 20–22.
[67] See Article 294 TFEU.
[68] For details see Sieberson, 'Inching Toward EU Supranationalism' 940–966.
[69] The provisions relate to the fields of CFSP, budgetary planning, family law issues with cross-border effects, enhanced co-operation and EU programs on environmental protection. ibid 953.

and proper clause".[70] However, to make this picture really complete, it should also be mentioned that even in some of the areas subjected to QMV under the new Lisbon provisions a certain "veto power" or safeguards were retained by allowing the invocation of national policy preferences.[71]

In sum, from a static point of view, one may argue that the changes introduced by the Lisbon Treaty concerning QMV were predominantly extended to technical issues only and, therefore, do not affect the core components of Member States' sovereignty.[72] This assessment is certainly not untrue when evaluating the Lisbon Treaty modifications in themselves. However, if one regards the Lisbon Treaty modifications as a phase in a much longer and broader historical process that had begun with the consolidation of EC decision-making as provided by the Single European Act and evolved with both the subsequent treaty-amendments and the birth of the European Union starting to integrate two originally intergovernmental pillars into the previously common-market centred framework, a different interpretation may also be arrived at. In fact, the entire process that resulted in the Lisbon Treaty modifications may also be regarded as the triumph of sovereignty pooling in many Community, later Union, policy areas. Obviously, this does not mean that the European Union as a whole has become a completely supranational entity based on sovereignty pooling, but in many policy areas – from institutional matters through the various issues of the internal market to cooperation in justice and foreign policy – sovereignty pooling became a definite reality. If one compares today's situation with the situation of 1966, when the possible introduction of QMV into the common agricultural policy decision-making gave rise to a political crisis with a threatening effect on the future of European integration, the success of sovereignty pooling becomes irrefutable.

The Lisbon Treaty also meant a great step forward in the settlement of the division of competences between the Union and the Member States from the perspective of sovereignty pooling. Until the Lisbon modifications the system of vertical division of competences had been clarified mainly by the case-law of the ECJ, that is, apart from some basic treaty provisions on the Community/Union activities it had a strong judge-made law character. However, for the very first time of the course of European integration, the Lisbon modifications introduced a complete "competence clause" similar to federal solutions providing a detailed description on the division of Member State and federal competences.

[70] Cf. Schütze, *From Dual to Cooperative Federalism* 133–143.
[71] For instance, Article 31(2) TEU or Article 48 TFEU
[72] This line of argumentation is summarized by Sieberson, see: Sieberson, 'Inching Toward EU Supranationalism' 954.

Articles 4 and 5 TEU set forth the main principles of competence sharing – the principle of conferral, delimitation of Member State competences etc. – while Articles 2 to 6 TFEU defines the various categories of union competences and declares the principle of pre-emption with regard to shared competences. Hence, a seemingly federal approach to competence sharing between the central or national government, the Union, and the Member States was declared by the Lisbon Treaty, although it should also be admitted that in substantial terms this new constitutional framework does not modify the earlier *status quo* between these two levels of governance in the European Union. In addition, certain key federal competences – for instance: military affairs, foreign policy or federal fiscal policy – are still in the Member States' hands almost completely, therefore the emergence of a United States of Europe cannot be inferred, let alone promulgated.[73] Nevertheless, the appearance of this fully-fledged federal attitude in the wording of these provisions may strengthen the impression that the creation of a smooth legal framework for sovereignty pooling at a general level is among the future aims of the integration process. And, as it occurred in the period of 1970s and 80s, the ECJ may have a decisive role in the clarification of these provisions, with special regard to the fact that a political stalemate has begun in the last ten years that can be compared to the period of "Eurosclerosis".

### 3.3. The place of sovereignty pooling in the current Union architecture

From the foregoing seems undeniable that the intent for sovereignty pooling is one of the main motives behind the evolution of the European Union constitutional architecture. It is well-reflected in the recent constitutional setting that provides a structure in which state – Member State – sovereignty can hardly be interpreted in the conventional Bodenian way as many sovereign competences are either eroded by the work of the Union institutions or conferred to the Union level. Further, the formation and evolution of the European Community, later the Union, constitutional architecture convincingly illustrates the validity of Keohane's broad concept of sovereignty pooling as a major impetus.

From a different angle, evidently, no one can convincingly argue that the European Union's existence is predicated on the complete realization of sovereignty pooling. Still, there are many important policy areas – the three most important: fiscal, defence and foreign policy

[73] For a detailed discussion see B Fekete, 'Does the Emperor Really Have new Clothes? A Critical Assessment of the Post-Lisbon Regime of Competences' in *Hungarian Yearbook of International Law and European Law, 2013* (The Hague, Eleven, 2014) 75–91.

– that are under the dominant control of the Member States. In sum, in harmony with Keohane's insights, the recent status of sovereignty pooling is certainly not an "all or nothing" issue in the European Union constitutionalism, but a balance swinging between total sovereignty and complete sovereignty pooling with numerous nuanced intermediate positions. In the post-Lisbon situation, it can be argued that sovereignty pooling was a clear success in policy areas related to the internal market in the broadest sense while it had only modest or even little impact on other important policy areas mostly associated with the traditional core of sovereignty.

However, the European crisis which began in 2009 exposed political and legal phenomena that seem to suggest that the strategy of sovereignty pooling – in spite of its earlier manifest successes – has inherent limits in Europe. Basically, it seems that Member States in times of crises[74] prefer to invoke the classical understanding of sovereignty as a panacea for all newly-emerging problems. This happens not exclusively on the level of pure everyday political rhetoric, but the general attitude towards EU law obligations has also been affected by this noticeable shift in the approach to sovereignty. The next part will make an attempt to formulate some lessons from the various experiences of this on-going process with respect to the idea of sovereignty pooling.

## 4. The nightfall of sovereignty pooling in Europe?

In the main, the events of this decade have been full of political or legal developments that implied yet another general and substantial shift in the European understanding of sovereignty. These developments indicate that the spreading and dominance of the idea of sovereignty pooling in the European Union's constitutionalism is not the final point in the European story of sovereignty. In essence, one may have the impression that sovereignty as it was conceptualized by the classic approach has gradually been reanimated in the European constitutional and political discourse. Numerous different patterns can be identified in this renewed discourse on sovereignty – from the intensifying of the references to "constitutional identity" to the open political claims for full sovereignty as exposed during the debates on the Brexit referendum. Thus, a comprehensive overview and analysis would be worth even an independent monograph. However, it is apparent that the main dividing line among these various new patterns of sovereignty discourse is whether they are associated with specific

[74] Here, the term crisis is applied in the sense of Schmitt's "exceptional situation". See C Schmitt, *Politische Theologie: Vier Kapitel zur Lehre der Souverenität* (München and Leipzig, Duncker & Humblot, 1922).

legal problems or they have a dominantly political character. Obviously, those which put the new sovereignty discourse into a(n often daily) political context are to be examined by the methods of political discourse analysis, therefore they stand far from the scope of this chapter focusing on a constitutionalism-oriented approach to European Union law. However, the other aspect, when the sovereignty issue is embedded in a specific legal dispute, seems to be a proper subject for analysis. Thus, the following parts will be dedicated to two segments within the general EU law discourse, both with high relevance regarding the transformation of the overall attitudes towards pooled sovereignty.

### 4.1. External judicial resentment to the deepening of sovereignty pooling

A potential field for studying new tendencies in the understanding of sovereignty pooling may be the comparative analysis of some relevant decisions of Member State constitutional and supreme courts. It can be argued that the judicial system of the European Union, a structured network of the Member State and European Union courts, has a considerably interconnected nature, although the term "dialogue" may seem to be too excessive to describe properly the relationship between the EU and national courts in some cases.[75] Therefore, the national constitutional court decisions may also have something to say on European Union constitutional issues such as sovereignty pooling by representing and articulating the Member State view. These national decisions may even shed light on the "national" attitude (which is often not explicit enough) towards the main constitutional issues of integration. These can be valuable additions to the "official perspective" promoted by the various EU institutions and high functionaries.

First, one may notice that the number of those national constitutional court decisions that have some relevance in this specific case have certainly increased in the last fifteen years as compared to the "golden age" of the European project. This is, of course, mostly due to the fact that the European Union had started to move in a more and more federal direction since the early 2000s and this evolution had certain repercussions for the core competences of sovereignty – they have been relevant from the national constitutional law perspective.[76] Thus, it can be argued that the birth of such national decisions has been a natural consequence

[75] For an insightful discussion of the problem of "judicial dialogue" in the EU see M Claes and M de Visser, 'Are You Networked Yet? On Dialogues in the European Judicial Networks' (2012) 8 *Utrecht Law Review* 100–114.

[76] This controversy, the potential conflict between the national constitutional system and community law, first appeared in Germany. Cf. Solange I Beschluss (BVerfGE 37, 271) (1974).

of the substantial deepening of the integration. Second, it should also be taken into account, however, that the latest wave of national decisions interpreting EU constitutional law issues have mostly, but not exclusively, been made by constitutional courts of the new, Central and Eastern European, Member States. That is, national judiciaries of the newly entrant Member States evince a high degree of sensitivity to the constitutional law aspect of integration and the consequences thereof to the national legal orders.

In order to demonstrate the attitude of this stream of case-law, a number of decisions will be analysed hereafter with respect to their attitude towards sovereignty pooling, as this may uncover some national attitudes towards pooling sovereignty in a supranational framework.

It would be very tempting to argue that these national constitutional court decisions reveal both a high level of scepticism towards the current constitutional status of the European Union and a concomitant fondness for the concept of sovereignty as an absolute and irreducible political status. However, this line of argument would be a serious oversimplification. It is true that these decisions focus on and praise sovereignty to a great extent. As for instance, where the Supreme Court of Estonia points out that "the sovereignty clause of the Estonian Constitution is strict in wording, providing that the independence and sovereignty of Estonia are timeless and inalienable"[77] or the Polish Constitutional Tribunal stresses when discussing the case of a potential collision between an EU law provision and a national constitutional one that "such a collision may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm."[78] Further examples of this attitude can be found in the cited or other decisions in great numbers.[79] That being said, the language of these decisions is certainly disposed towards sovereignty which may suggest that these courts are definitely not against the concept of (national) sovereignty in general.

However, if one examines the arguments about the collision of sovereignty and European Union law obligations another relevant point becomes apparent. By citing the concept of absolute sovereignty, these courts do not claim to recoil from European Union law commitments, but try to point out the "internal" legal limits of the Union's sphere of actions, thereby defending the core of their national constitutions, frequently labelled as "constitutional identity". [80] In the words of the Constitutional Court of Latvia: "The Constitutional Court recognizes that the State of Latvia is based on such fundamental values

[77] Constitutional Judgment 3-4-1-6-12 (Judgment of the Supreme Court en banc), 128.
[78] Judgment of 11th May 2005, K 18/04. *Poland's Membership in the European Union (Accession Treaty)*, 13.
[79] For instance Decision of the Hungarian Constitutional Court, 22/2016 (XII. 5.) para 60; Judgment on behalf of the Republic of Latvia, Riga, 7 April 2009, Case No. 2008-35-01, 14.
[80] For a classic and comprehensive account of "constitutional identity" see GJ Jacobsohn, 'Constitutional Identity' (2006) 68 *The Review of Politics* 361–397.

that, among the rest, include basic rights and fundamental freedoms, democracy, sovereignty of the State and people, separation of powers and rule of law", therefore the "delegation of competences cannot exceed the rule of law and the basis of an independent, sovereign and democratic republic based on the basic rights."[81] Or, the Hungarian Constitutional Court submits that the main components of the constitutional identity of Hungary can definitely be identified even though this is not a closed and final list; in the eyes of the Hungarian justices, civil liberties, separation of powers, republicanism, autonomies under public law, freedom of religion, rule of law, parliamentarianism, equality before the law, judicial power and the rights of the nationalities are all main components of this perceived constitutional identity, fundamentally characterizing the Hungarian legal order.[82] Moreover, the Hungarian justices also stress that constitutional identity as a sum of these values and legal institutions cannot be given up in any circumstance, only the cessation of sovereignty may lead to their rejection.[83]

In sum, the phrasing of these decisions envisages the relationship between the EU and national legal orders a dynamic "liaison" that may imply potential collisions between the EU and Member State legal provisions and general values. That is, the relationship between these two levels of legal orders – a supranational one and the national one – is not only about a harmonious cooperation, but also competition and collision.[84] Therefore, the boundaries of European Union legal actions must be defined in a precise way enabling the Member State courts to defend their own legal orders against any illegitimate encroachment by EU powers. Needless to say, these questionable interferences may mostly stem in the future from policy fields pervaded by sovereignty pooling.

Therefore, one may argue that there certainly exist a noticeable reluctance in the practice of national constitutional or supreme courts toward the extension of sovereignty pooling, led by Central European and Baltic judiciaries,[85] to such novel fields that are closely linked to the core of sovereignty, in other words, to the constitutional identity of a legal order. This reluctance, or scepticism to a certain degree, towards pooling sovereignty in relation to more political and value oriented issues may be interpreted to mean that the relationship between

[81] Judgment on behalf of the Republic of Latvia, Riga, 7 April 2009, Case No. 2008-35-01, 17.
[82] Decision of the Hungarian Constitutional Court, 22/2016 (XII. 5.) Section 65.
[83] Decision of the Hungarian Constitutional Court, 22/2016 (XII. 5.) Section 67.
[84] Cf. with the position of Daniel Halberstam arguing that this kind of controversy may help in the identification of the values of constitutionalism in Europe, therefore this unsettled situation cannot be regarded as a simple source of conflict. D. Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in JL Dunoff and JP Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge, Cambridge University Press, 2009) 326.
[85] For a similar argumentation from Western Europe see for instance Décision n° 2006-540 DC du 27 juillet 2006, 19, and UK Supreme Court, *R v The Secretary of State for Transport*, 22 January 2014, 207.

the two levels of governance – the "European" and the "national"[86] – in the European Union are still not settled. Neither in a political, nor in a legal sense.

### 4.2. Internal scepticism towards the deepening of sovereignty pooling

Parallel to the reluctance of some national supreme courts the continuous extension of sovereignty pooling to new policy areas has also been challenged within the decision-making framework of the European Union. A major example for this has been the serious controversy engendered by the so-called "migrant quotas decision" enacted in September 2015.[87] The story of this Council decision and the follow-up events provide a vivid illustration for many relevant legal aspects of the on-going sovereignty discourse.

In sum, this Council decision was enacted as an emergency answer to the grave problems raised by the influx of "nationals of third countries" – mostly refugees and migrants from Syria and the Sub-Saharan regions – starting in earnest from 2014. As is well known, this inflow affected the European Union in a very disproportionate manner. Due to simple geographical reasons, it was dominantly Greece and Italy that had to cope with this enormous challenge. Further, the so-called Dublin regulation, setting up the general frame of asylum policy in the European Union, left the competence to examine the claims of the applicants – who entered irregularly the territory of the European Union and who did not – for the purposes of international protection in national hands.[88] The authorities of Greece and Italy had to manage a serious and lasting humanitarian crisis situation on their own – largely because of the provisions of the Dublin regulation – which had serious repercussions for the entire European Union. The Council decision's main goal was to provide efficient help to both countries by making it possible to relocate around 120,000 third country asylum applicants to the other Member States on the basis of a proportionate quota set up by the experts of the Commission. Having been the subject of fierce political battles beforehand, the decision was made on the basis of Article 78 (3) TFEU enabling the Council to adopt

[86] For some lessons from the US see M Tushnet, 'Enforcement of National Law against Subnational Units in the US' in A Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford, Oxford University Press, 2017) 316.

[87] Council Decision (EU) 2015/1601 of 22 September 2015 *establishing provisional measures in the area of international protection for the benefit of Italy and Greece*.

[88] Regulation (EU) No 604/2013 OF The European Parliaments and of the Council of 26 June 2013 *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*. Article 13 (1) and (2)

provisional measures in an emergency situation where a country experiences a "sudden inflow of nationals of third countries".[89]

The justification of the decision was twofold. First, the decision argued that an obvious emergency situation obtained in the Mediterranean due to "exceptional migratory flows in the region" that called for a common and coordinated action by the entire European Union.[90] Second, the decision also set forth that such exceptional situations may only be effectively countered by subscribing to the principles of solidarity and the fair sharing of responsibility among the Member States.[91] Thus, the enactment of the decision was determined by the motives of pooling sovereignty, and it was mostly due to the circumstances of a situation that cannot effectively be managed by individual Member States alone, but needed coordinated action under the supervision of autonomous supranational institutions designed to act in accordance with the Union's interest as a whole.

For practical reasons, the decision had to be made in a QMV vote although many members of the Council as well as the Commission openly favoured and promoted a unanimous and thus consensual decision in such a sensitive case. In the event, the representatives of the so-called Visegrad Group – except Poland – and Romania voted against the "quota decision", while Finland abstained from voting. These countries rejected the setting up of a mandatory quota system that would deprive them of sovereign decisions in similar cases for the future.[92] This outcome was not unexpected, as the opposing countries announced through various diplomatic channels their doubts about this way of problem-solving and their disenchantment with QMV decision-making.[93] As a further step, Slovakia and Hungary lodged parallel applications to the European Court of Justice in which they sought the annulment of this Council decision made in December 2015. The applicants enlisted manifold arguments to support their claim, but, in general, they specifically contested the application of QMV decision-making in this matter.[94]

[89] Article 78 (3) TFEU.
[90] Cf. Preamble of Council Decision (EU) 2015/1601 of 22 September 2015, paragraphs (3), (9) and (21).
[91] Cf. Preamble of Council Decision (EU) 2015/1601 of 22 September 2015 paragraphs (2), (5), (16), and (30).
[92] From a comprehensive and neutral summary of the story the Council Decision see J Barigazzi and M. de la Baume, 'EU Forces Through Refugee Deal' *Politico*, 23 September 2015, www.politico.eu/article/eu-tries-to-unblock-refugee-migrants-relocation-deal-crisis/
[93] For the details see J Barigazzi and M Baume, 'Tusk's summit task: European Unity' *Politico*, 21 September 2015 www.politico.eu/article/the-eu-nuclear-option-on-migration/
[94] Action brought on 2 December 2015 — *Slovak Republic v Council of the European Union* (Case C-643/15) OJ C/41–43. Action brought on 3 December 2015 — *Hungary v Council of the European Union* (Case C-647/15) OJ C 38/43–44.

The history of the enactment of this Council decision is open to many different political and legal interpretations in addition to the special relevance it has for the currently evolving constitutional position on sovereignty pooling in the European Union.

First of all, it has to be emphasized that the issue of "migrant quotas", or asylum policy in more general terms, is an area situated much closer to the "core" of sovereign competences compared to fields where sovereignty pooling has traditionally been successful, such as the policy areas closely related to the internal market. This means that Member States have only had limited experiences – as for instance when cooperating in justice and police issues – in the pooling of sovereign competences and may therefore be averse to pooling when any other competence is at stake. Thus, the scepticism towards pooling competences in the second and third pillars is a logical reaction, further buttressed by the traditionalist understanding of sovereignty.

Second, it is tempting to simplify the political divide around the contested decision to a binary opposition between the rationalism and value orientation of Western politics and the emerging populism of some Central European countries. Naturally, the rejection of the mandatory quota system to relocate asylum applicants cannot be separated from political populism,[95] but there is also a hidden, but equally influential motive in the background of the unusual behaviour of Central European member states in this case. This is the general public sentiment of fear from losing independence. In general, the development of Central European constitutionalism has been to a much broader extent dominated by various public sentiments than acknowledged by the Western literature. It can be proved that fear of losing independence, inter alia, was a prominent factor in tailoring the new, post-Socialist, constitutions and this affective impetus gave rise to unusual provisions in Central European constitutionalism.[96] As sovereignty as a political status is a key point with respect to the independence of any country, it can be argued that the rejection of the quota system that entitles the Commission to determine how many asylum applicants must be settled in a given Member State was also propelled by the public sentiment of fear from losing important components of sovereignty, thus endangering national independence.

Thirdly, one may recognise that two different concepts of sovereignty collided in the case of this "quota decision". The logic of pooled sovereignty offered a clear-cut answer to the crisis situation, but some of the Member States, lacking the same prehistory and thus

[95] For an analytic and scholarly discussion see G Mesežnikov, O Gyárfášová, and D Smilov (eds.), *Populist Politics and Liberal Democracy in Central and Eastern Europe* (Bratislava, Institute for Public Affairs, 2008).
[96] For details, see B Fekete, 'On the Role of Public Sentiments in the Emergence of Post-Transitory Central European Constitutionalism' (2016) 57 *Jahrbuch für Ostrecht* 243, spec. 249–252.

emotionally of a different, more traditional, predisposition towards sovereignty, rejected this way of problem-solving. This confrontation was solved by the option of QMV voting that led to the enactment of the decision; however the opponents challenged this by citing legal objections almost immediately. Thus, the opposing Central European countries express their rejection of the results of the QMV procedure by contesting its legal validity, by bringing an action for annulment to the ECJ. This clearly implies that these countries cannot subscribe to the tradition of pooling sovereignty as they are unwilling to accept the very essence of QMV voting by which individual state interests are to be overridden in the interest of the whole community with the help of win-win compromises. This sequence of events shows close similarity to the French attitude during the crisis of "empty chairs".

Last but not least, it should be mentioned that the law plays an important role in this – almost existential – conflict in allowing the translation of the political rejection of a decision to be expressed in quasi-neutral, professional terms. Thus the law assumes the role of taming the heated debate, providing it with a more rational frame than a mere political quarrel with its concomitant stalemate. Now it is up to the ECJ to decide whether or not Article 78 (3) TFEU provided a proper legal basis for this Council decision. Moreover, future judgments and their reception are likely to further expose the rifts and divergences among Member States with regard to the concept of sovereignty pooling.

### 4.3. Is absolute sovereignty now back in Europe?

In conclusion, one may point out that the idea of Bodenian sovereignty never ceased to exist and never lost its appeal in European political culture. This is demonstrated – *inter alia* – by the outcome of the Brexit referendum and the judicial reluctance to any further extension of sovereignty pooling to "sensitive", politically more central, policy areas. It might be more precise to observe that recent developments have provided a strong indication that the obvious success of the pre-Nice phase of integration – four decades of peace and prosperity in Europe – only froze the doubts and hostility towards the idea of pooled sovereignty among the European public and did not by any means eradicate them. At the very moment when this normal course of successful integration was interrupted by an unprecedented chain of consecutive crises – the European debt crisis, the crisis of Greece, and the growing inflow of asylum-seekers from 2014 – the problematic and weak points of the European project came into sharp relief, immediately awakening the traditional concept of Bodenian sovereignty. This, in turn, provided a potential tool for some Member States' political leadership with a

populist or nativist attitude to act upon their own, domestic, agenda. The inevitable conflict between the tendency to stake out or even reclaim sovereignty and the recent constitutional architecture of the Union can easily be predicted as it was duly demonstrated in the case of the "migrant quota" decision.

All in all, the main conclusion of this analysis is that the cultural embeddedness of sovereignty pooling cannot only be regarded as an advantage facilitating and propelling the evolution of this interstate cooperation strategy; it can be a disadvantage, too. Basically, in a crisis period,[97] when the political stalemate between the Union institutions and the Member States reveals the incapacity of the Union's political and constitutional mechanisms to offer efficient solutions to individual national problems,[98] Member States may easily and swiftly incline to adopt a more conventional approach to sovereignty which offers the illusion of autonomous and competent political behaviour. The logic of popular democracy also provides a favourable context for legitimizing individual state behaviour that diverges substantially from the cooperative and community-oriented tradition of supranational institution-building and joint action.

In sum, the thesis of this chapter is that the more political the goals to be achieved via sovereignty pooling in times of crisis are, the less chance there is to realise them in a political culture that has not forgotten, has not overwritten, the original concept of sovereignty, only abandoned it temporarily during times of peace and prosperity.

[97] Yet another reference to Carl Schmitt's interpretation of crisis.

[98] Cf. with Herman von Rompuy's argumentation calling for common action based on the co-responsibility of Member States if a Union level-crisis breaks out: Herman von Rompuy, 'The Discovery of Co-Responsibility: Europe in the Debt Crisis', Speech at the Humboldt University, 6 February 2012, 3.