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The EU as a Confederal Union of Sovereign Member Peoples: Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU

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PART II

A CONFEDERAL CONCEPTION
OF SOVEREIGNTY

1 INTRODUCTION: 'WE THE PEOPLES'?

Part I identified an increasing gap between the authority *capacity* of the EU's confederal foundation and the authority *demands* of its expanding federate superstructure. This gap, it was suggested, forms one of the root causes of the EU's legitimacy problems.

How to deal with this gap? A question that feeds into the more general challenge of grounding and democratically legitimizing an entity like the EU. A question also that brings to mind Rousseau's comment on the confederal dream of the Abbé de Saint-Pierre: 'He has designed so to speak the roof of a building of which it was necessary to show the foundations.'¹

A first obvious solution would be to downsize the federate superstructure. The problem is that the EU relies on its federate superstructure for stability. Downsizing it to a sufficiently confederal level would, consequently, revive the classic weaknesses of confederation and undermine the stability of the entire EU.² In the case of the EU the federate roof not just seeks a foundation, it also keeps the building together.

Upgrading the EU's foundation to a federate level is not a realistic solution either. At least not in the foreseeable future.³ Nor is it necessarily desirable.⁴ It would mean relinquishing the potential the confederal form holds for a more flexible and extra-statal design of government. One that is based on improved methods of democratically legitimizing public authority on several distinct levels, rather than just subsuming its members into a larger state.⁵

1 Rousseau, *Oeuvres*, III p. 658. Also see for the ideas of Rousseau on the 'good Abbé' Rosas (2003).

2 Although more work could be done to see if some federate modifications could be safely reduced, better contained or at least counterbalanced this path will not be further explored here.

3 Von Bogdandy (2000), 43-44, Rosas (2003), 2, Van Middelaar (2009).

4 Cf already Max Kohnstamm in his diary on October 19th 1956: 'We moeten niet natie Europa in plaats van natie Frankrijk plaatsen. Dit zou kleine zaak zijn die catastrofe ten slotte toch niet zou vermijden.' (We must not replace the French nation with a European nation. This would be a small-minded affair that would not avoid catastrophe in the end.' (my translation) in, M. Segers and M. Kohnstamm, *De Europese dagboeken van Max Kohnstamm. Augustus 1953 – September 1957* (Boom 2008), 187. Pleading for federation see – rather famously – F. Mancini, 'Europe, The Case for Statehood' 4 *European Law Journal* (1998), 43. Also see G. Morgan, *The Idea of European Superstate* (Princeton University Press, 2005).

5 Cf also the argument in Habermas (2001).

Consequently neither dismantling the federate superstructure, nor creating a US-style federate basis are feasible ways forward. A conclusion that seemingly leaves the EU, and us, in a bind. The EU seems to have both gone too far, and not far enough. It is either a failed orange, or a tangerine with dangerous delusions of grandeur.

Building on the confederal approach, part II of this thesis suggests that a confederal conception of popular sovereignty may offer one way out of this dilemma. It may provide a sufficiently stable, legitimate, and flexible basis for EU authority without undermining the Member States as primary centres of public authority or the member peoples as separate, independent and sovereign entities.

The starting point for this suggestion again lies in the US. More specifically it lies in the *federal evolution of the concept of popular sovereignty* that enabled the US to federate. As will be suggested the EU could emulate this federate application of sovereignty by taking it one confederal step further. A step that fits with the evolution and logic of sovereignty, and one that would enable the EU to reinforce its constitutional foundation without leaving the confederal confines.

2 AIMS AND ADVANTAGES OF A CONFEDERAL CONCEPTION OF SOVEREIGNTY

Part II therefore explores a possible evolution towards a *confederal* conception of sovereignty for the EU. If feasible, such a conception would serve several more specific aims and offer several advantages that are useful to set out first.

2.1 *Removing sovereignty as an obstacle to constructive theory*

To begin with a confederal conception may reduce the false juxtaposition between sovereignty and integration, and the unfortunate effects this juxtaposition has on a constructive constitutional theory of the EU.

Currently sovereignty is generally seen as an obstacle to integration.⁶ As a result those defending national sovereignty often see themselves forced to limit integration to a low level that does not undermine the sovereign state. Those supporting further integration generally feel compelled to reject sovereignty altogether precisely because it obstructs any meaningful level of integration.⁷ The resulting conflict leaves sovereignty a divisive concept.

6 See amongst many others Schütze (2012), 48: 'From the very beginning, the idea of state sovereignty hindered an understanding of the nature of the European Union.' See for a detailed discussion ch. 9 below.

7 Bellamy (2006), 168.

One that is either strongly attacked or absolutized as the last line of defence against a European super state.⁸

Since both camps field convincing arguments, this juxtaposition tends to force one into some undesirable and often untenable positions. The result generally is an unhelpful deadlock in the debate on European integration. Like the German Constitutional Court, for instance, one may end up defining the minimum 'substance' of national democracy, or devising all kinds of other unworkable or opportunistic limitations on integration.⁹ The alternative strategy of ostracizing sovereignty altogether generally leaves one with a daunting hole in the organization and legitimization of authority.¹⁰ What tends to remain are several free-floating authorities that are hopefully restrained, but scarcely legitimated, by a dialogue between them on some values they are presumed to share.

An evolved notion of confederal sovereignty may be able to soften this juxtaposition between integration and sovereignty. In doing so it may also bring sovereignty back in play as part of the solution. Instead of having to overcome sovereignty, and all the normative authority and national history that comes with it, the EU could start to rely on it. An outcome that also leads to the second, and even more fundamental, advantage of confederal sovereignty for the EU: the prospect of a sufficiently stable and legitimate foundation.

2.2 *Grounding the EU in its sovereign member peoples*

A confederal conception of sovereignty could enable the EU to ground its authority, including its federate superstructure, in the one foundation strong enough to support it: the *sovereign member peoples* as embodied, organized and represented by their states.¹¹ This would allow a solid confederal foun-

8 Cf Lindahl (2006), 87.

9 See for a detailed discussion of the case law of the German *Bundesverfassungsgericht* chapter 8 section 4.4.

10 This also *within* the Member States, where national authority may be linked to the discourse of sovereignty as well, or in the words of Walker, where 'notions of sovereignty' are necessary 'within the meta-language of explanation.' (Walker (2006b), 25). This is especially the case in the Central and Eastern European Member States, where, largely due to their Soviet history, sovereignty plays a far more central role, and 'relinquishing' it is both far more sensitive and generally constitutionally restricted. See A. Albi, 'Postmodern Versus Retrospective Sovereignty: Two Different Discourses in the EU and the Candidate Countries', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 402.

11 See on this position of the citizens also Pernice (2002), 511 et seq. as well as De Witte (1995), who contemplates placing sovereignty in the peoples of the EU taken together. As such this position does not believe that 'cosmopolitan' or 'universal' shared principles can be enough to carry the full weight of public authority, even though they can play an important supportive role. Different see, for instance: M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in: J.L. Dunoff and J.P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009) p. 258.

dation without requiring the abolition of the Member States or the separate member peoples. Rather than competing with these entities for authority and legitimacy, or even threatening to replace them altogether, the EU could build on them in a more symbiotic, and confederal, fashion.

If such a confederal foundation could be conceptualized, sovereignty could indeed be turned from an obstacle to theory and integration into a constructive tool for both. A reapplication that would allow the EU to harness the legitimizing and organizing potential of sovereignty, instead of resisting it. Several further advantages would also flow from these two primary ones.

2.3 *The fit of confederal sovereignty with EU Treaties and case law*

A first additional advantage of confederal sovereignty is its fit with the consecutive EU Treaties and their progressive interpretation in the case law of the European Court of Justice. It particularly fits with, justifies, and delimits one of the fundamental trends in both: the progressive inclusion of the individual.¹² From direct effect to direct representation, expanding EU citizenship, or the inclusion of national parliaments into the EU institutional structure, all of these developments can be placed in the gradual relation building between the EU and its popular sovereigns, and the ‘ever-closer union among the *peoples of Europe*’ already envisioned in the preamble of the Treaty of Rome.¹³ A relation, however, that is still in need of the conceptual and constitutional foundation that confederal sovereignty may help to construe.

2.4 *Confederal constitutionalism and confederal supremacy*

Two further advantages concern the fit between confederal sovereignty and EU constitutionalism, and the different perspective it allows on the supremacy conundrum.

To begin with a confederal approach fits with the increasing popularity of approaching the EU through a constitutional lens. A confederation, after all, creates a constitutional bond between the different members, certainly where this bond is based on the sovereign peoples directly. At the same time a confederal approach also captures the ambivalence of a purely constitutional understanding of the EU.¹⁴ An ambivalence perhaps best captured by

12 Cf Rosas (2003), 3.

13 To the extent that political authority is relational in nature, the EU can also only become political, and be *politically* legitimized, by establishing a relation with the citizens. (Cf H. Arendt, ‘What is Authority?’ in: H. Arendt, *On Revolution* (Penguin 1973), 175). Part of the exercise here is to show how such a relation with the sovereign people directly does not require federation or the removal of the states.

14 Cf on this point also Schmitt (2008), 385 and his term of a ‘constitutional contract’.

the term constitutional treaty, which retains the link with both the international and the constitutional dimension.¹⁵

Second, and closely related, a confederal conception of sovereignty also allows a more logical understanding of the seemingly incompatible claims to primacy at the national and the EU level. Claims which from a confederal perspective are simply based on different and largely compatible grounds. Consequently the clash between national and European claims to supremacy may be partially neutralized once they are related to the overarching claim of the sovereign member peoples.

2.5 *An attractive narrative: A confederal evolution of democracy*

Lastly, and most tentatively, confederal sovereignty may assist in constructing a more positive and normatively attractive narrative of the EU. In the US, after all, federalism became part of the powerful narrative of popular government: the sovereign people were given two governments who would both strive and compete to serve the citizen.¹⁶ Confederal sovereignty might allow a similar narrative by recasting the EU as a creature of the member peoples. Instead of a threat to democracy and national identity the EU could also be seen as a second layer of government that liberates the people from their entrapment in the state, and allows them to exist and act on the increasingly vital global plane. From this perspective the EU may transform from a threat to national democracy to a tool to restructure and update the national democratic process, and save it from irrelevance. To explore the potential for such a narrative this particular value of confederal sovereignty will also be introduced in part II, before it is further tested and developed in part III of this thesis.

3 APPROACH AND METHOD: LIMITING SCOPE AND AMBITIONS

Now it appears customary to start any expedition into the realm of sovereignty by proclaiming one's utter despair.¹⁷ The concept is so old and con-

15 See for a discussion of this question chapter 10 section 7.

16 See for the anti-democratic intentions behind this narrative, however, above chapter 5, section 2 and 3.

17 See for instance: M. Akehurst, *A Modern Introduction to International Law* (4th ed., Allen and Unwin 1982), 15 or R. Barents, *De Communautaire Rechtsorde* (Kluwer 2000), 69. Although more optimistic views can be found as well, as in: J.D.B. Miller, *The World of States: Connected Essays* (St. Martin's Press 1981), 16: 'Just as we know a camel or a chair when we see one, so we know a sovereign state. It is a political entity which is treated as a sovereign state by other sovereign states', Of course the rather circular nature of this approach might in turn only serve to increase desperation again. Defying the mysticism a 'working definition' is also provided by Walker (2006b), 6.

tested¹⁸ that compared to analyzing it, even the Danaids had an easy job.¹⁹ More hole than barrel, any attempt to fill in even the basics dissipates ingloriously.²⁰ One popular solution, therefore, is to simply discard the entire concept: Even if practical in the past, surely this archaic notion no longer forms a useful paradigm in this post-modern age of globalization.²¹

Clearly this author does not share the rejection of sovereignty as a useless relic.²² Quite the opposite: the controversial role of sovereignty only

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- 18 H. Jahrreis, 'Die Souveränität der Staaten. Ein Wort – mehrere Begriffe – viele Missverständnisse', in: R. Hofmann (ed), *Die Entstehung der modernen souveränen Staates* (Kiepenheuer & Witsch 1967), 35 et seq., Loughlin (2006), 56, A disagreement that is already quite clear from the wide array of conflicting adjectives used such as domestic sovereignty, monetary sovereignty, new sovereignty, pooled sovereignty, popular sovereignty legal sovereignty, political sovereignty etc.
- 19 Just epistemologically the terrain is already a minefield. See for instance J. Bartelson, *A Genealogy of Sovereignty* (CUP 1995), especially ch. 2. An impressive overview is, however, given by Hinsley (1986).
- 20 H. Kelsen, *Allgemeine Staatslehre* (J. Springer 1925), 102 et seq. already gives eight different meanings and applications. S.D. Krasner, *Sovereignty, Organized Hypocrisy* (Princeton University Press 1999), 3 gives four. G. Schwarzenberger, 'The Forms of Sovereignty', 10 *CLP* (1957), 264, compares discussing sovereignty to 'shadowfighting' whilst according to Koskenniemi every attempt to define it per definition oscillates between two necessary yet irreconcilable poles: M. Koskenniemi, *From Apology to Utopia: The structure of International Legal Argument* (CUP 2005). Also see: N.G. Onuf, 'Sovereignty: Outline of a Conceptual History', 16 *Alternatives* (1991), 425 et seq.
- 21 This is not an exclusively modern phenomenon, by the way. Kelsen already supported abolishing it for example (H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen 1920), 321 et seq., in the 1950's sovereignty was also on its way out (W.J. Rees, 'The Theory of Sovereignty Restated' 59 *Mind* (1950), 495, and Foucault equally rejected it forcefully (M. Foucault, *Power/Knowledge* (Harvester 1980), 121. Nevertheless such rejections of the concept do seem to have become more popular with the current globalization and European integration. See, amongst many others, K. Schiemann, 'Europe and the loss of sovereignty', 56 *International Comparative Law Quarterly* (2007), 475; D. Held, *A Globalizing World?* (Routledge 2004); Krasner (1999); W. Wallace, 'The Sharing of Sovereignty: the European Paradox' 47 *Political Studies* 1999, 503; D. Philpott, 'Westphalia, Authority, and International Society', 47 *Political Studies* (1999), 566; MacCormick (1999); W. Pogge, 'Cosmopolitanism and Sovereignty', 103 *Ethics* (1992), 48 or already T. Koopmans, 'De Europese Gemeenschappen en het Nederlandse staatsbestel' *RM Themis* (1980), 276, 287. For a very clear overview see Van Roermund (2006), 33 discussing the 'Argument from Redundancy' and the 'Argument from Incoherence'. An alternative is to accept the concept, yet to deny it has a fixed extension, such as Koskenniemi (2005), 242: 'There simply is no fixed meaning, no natural extent to sovereignty at all'.
- 22 Perhaps one could even reverse matters: sovereignty is so fundamental and dominant a paradigm, that every (seeming) diversion from it draws enormous attention. Also see R. Jackson, *Sovereignty: The Evolution of an Idea* (Polity Press 2007), 110: 'We are living at a time when existing territorial jurisdictions are vested with exceptional international validity'. Equally see Koskenniemi (2005), 237, Lindahl (2006), 87, Walker (2006), 301-31 and Walker (2006a), vi: 'Yet the idea of sovereignty cannot just be wished away. Neither is it obvious that it will simply wither away, nor that its secular decline should be approved or encouraged.'

seems to reaffirm its continued relevance.²³ Nevertheless its multi-dimensionality, rich history, and the numerous learned – and conflicting – comments devoted to it do mean that any attempt to permanently pin down sovereignty inevitably runs into its diverse meanings and uses. Sovereignty arrangements differ per polity, and may even be contested within a polity. Agreeing on the Belgian, Spanish, British or Dutch sovereign, for instance, is already difficult in itself.²⁴ Sovereignty, and the vocabulary on sovereignty, furthermore, are intimately linked to the state and carry strong normative connotations. Any application outside the state must, therefore, be sensitive to the statal context and normative assumptions imbedded in sovereignty discourse.²⁵

These risks and limits, together with the modesty they necessarily inspire, must be respected when engaging with sovereignty.²⁶ All previous caveats about comparative and conceptual analysis in general, furthermore, have to remain in full force as well. By engaging sovereignty, furthermore, we also enter a more normative dimension, certainly where particular notions as popular sovereignty are not just described or analyzed, but suggested as the ‘best’ option for the EU. In addition even a descriptive analysis of sovereignty cannot avoid highly contested and normative terrain. This normative dimension also forms an important limitation, as any disagreement on normative assumptions may not be settled objectively. To a certain extent the analysis in part II minimizes this risk by relying on normative conceptions that are as thin as possible, and are hence generally shared. These primarily include a thin notion of democracy and the claim that within a democratic system authority should ultimately derive from, or be linked to, the people. Where thicker notions are relied upon, furthermore, these will be defended.

At the same time the limited aim of this chapter does not require us to provide the exclusive or ‘true’ definition of sovereignty, if that is even possible for social facts. The far more limited aim is to put forward, and make an initial contribution to, a specifically confederal conception of popular sovereignty suited for the EU. Rather than demanding its expulsion from civilized EU discourse, in other words, it explores whether European integration should not embrace sovereignty, albeit by spearheading a gentle

23 Cf. De Witte (1995), 170: ‘the debate on the Treaty on European Union has started a new phase of turmoil in the legal analysis of European Integration, and the concept of sovereignty is playing a key role in this debate which should be acknowledged by both its defenders and its opponents.’

24 See for instance the contributions by J. Ziller, M. Aziz, M. Cartabia, K. Armstrong, B. de Witte and C. Mik in: N. Walker (ed), *Sovereignty in Transition*, (Hart Publishing 2006).

25 J. Shaw and A. Wiener, ‘The Paradox of the European Polity’, in: M. Green Cowles and M. Smith (eds), *State of the European Union vol. 5: Risks, Resistance and Revival* (OUP 2000), 64, Loughlin (2006), 57.

26 Cf Carl Schmitt (2005), 16-17.

reapplication of its essential core to new circumstances.²⁷ To this end, and actually building on the richness and variety within the idea of sovereignty, two definitional elements of confederal sovereignty will be proposed.

First and foremost it will be suggested that a confederal conception of sovereignty should be based on an internal, and not an external concept of sovereignty. Much of the current confusion surrounding sovereignty and the EU derives from – often implicit – reliance on simplified and external conceptions of sovereignty.²⁸ Second, and flowing from this internal focus, sovereignty should rest with the different semi-abstract member peoples as constituted within their states.²⁹ Though these two elements clearly fall short of a sufficient definition, it is suggested that they form necessary elements, and already give some shape to a confederal conception of sovereignty. In any event they assist in demonstrating the *prima facie* attractiveness of such a conception.

These two elements will be developed and tested through two complementary methods. On the one hand part II will demonstrate the fit of confederal sovereignty with the logic and conceptual evolution of sovereignty. It does so via a succinct conceptual analysis which first untangles the internal and external strands of sovereignty, and subsequently shows how confederal sovereignty forms a logical next step in the evolution of internal sovereignty.

On the other hand confederal sovereignty will be tested against the opposing camps of statism and pluralism. Two influential schools that lie at the opposite ends of the ‘sovereignty’ debate: the ‘statist’ defenders of sovereignty, with the *Bundesverfassungsgericht* as its main champion, and the

27 Walker (2006), 28: ‘(...) the dynamic of transformation within late sovereignty will involve the continuous evolution, rather than the demise of sovereignty.’

28 See for instance Maduro (2006), 504-5. For, right after the ritual despair and the exoneration that sovereignty is a contested concept, as described above, it usually turns out that happily there does exist an acceptable working definition of sovereignty. This definition may respectably be used, especially where sovereignty is not the main focus. It generally is a variation of ‘internal supremacy over all other authorities within a given territory, and external independence of outside authority.’ Cf. R.O. Keohane, ‘Ironies of Sovereignty: the European Union and the United States’ 40 *JCMS* (2002), 746 (Citing Bull) or comparable Jackson (2007), 6. For a similar conclusion already drawn in 1922 see Carl Schmitt (2005), 17: ‘Nevertheless the old definition, in phraseological variations, is always repeated: Sovereignty is the highest, legally independent, underived power.’ The general acceptance of this definition unfortunately, seems to be directly proportional with its meaninglessness. Essential questions such as the meaning of supremacy or authority are not answered, but simply made part of the definition.

29 This does not necessarily entail the claim that within each Member State the people are or should be the formal sovereign as well, even though almost all national constitutions of EU Member States do acknowledge the sovereignty and ultimate authority of the people. See for an overview chapter 10, section 3.2. and chapter 12.

'pluralist' challengers, rejecting sovereignty as a thing of the past.³⁰ This confrontation with statism and pluralism also connects our confederal approach to the existing theories on the EU and to the challenges these theories engage with. In addition to testing the feasibility of confederal sovereignty in itself, this application of a confederal approach also explores a potential synthesis: to what extent may the key truths and objectives of statism and pluralism be far more compatible with each other than they seem, at least once both are considered from an evolved understanding of confederalism and sovereignty.³¹ If correct, a confederal application of sovereignty may allow us, at least in part, to combine the respective strong points of statism and pluralism.

4 STRUCTURE

To achieve the aims set out above section II is structured as follows. First we need to set out the perceived problems concerning sovereignty and the EU: why do sovereignty and integration seem to deadlock? To do so we turn to the statist and pluralist schools, and their opposing views on sovereignty (chapter 8). Once we have established an understanding of the problem we turn to the conceptual development of sovereignty itself. It will be demonstrated that, different from what is often assumed, internal and external sovereignty are two distinct, albeit related, concepts. To this end the development of the internal and external strands of sovereignty will be traced through five different stages of their development and conceptual entanglement, including the accommodation of federal government and sovereignty in the US. These stages lead up to the current point where the EU again collides internal and external sovereignty, acting as a sort of Hadron collider for constitutional theory and the concept of sovereignty. Just as the Hadron collider breaks up atomic particles by colliding them, the presumed elementary particle of sovereignty is collided with the EU, and subsequently breaks up into the more elementary particles of internal and external sovereignty, the characteristics of which we can then study separately (chapter 9).

30 On the (academic) prominence of (constitutional) pluralism see, somewhat hyperbolic, Weiler (2012), 1 who calls it a 'academic Pandemic'. A pretty exclusionary virus at that since 'Constitutional Pluralism is today the only Party Membership Card which will guarantee a seat at the High Tables of the public law Professoriate.'

31 In this regard this thesis aims to contribute to the aim already formulated by Walker: 'The task, therefore, of political and constitutional theory in conditions of late sovereignty is not to imagine, or to anticipate, a world in which new political values and virtues flourish in the absence of sovereignty, but to imagine and anticipate ways in which such values and virtues may flourish *through* the operation of sovereignty (emphasis in original). Walker (2006), 31.'

Once the internal and the external concepts of sovereignty have been separated in this way, the idea of a confederal conception of sovereignty will be further introduced. Subsequently the different advantages set out above will be tested and explored (chapter 10), and some general conclusions will be drawn (chapter 11), before we continue with part III, which proffers some, highly tentative, suggestions to apply the conclusions reached in part I and II to the challenges of institutionalizing a confederal evolution of the national democratic process and the EMU crisis.