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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1 THE POSSIBILITY AND POSSIBILITIES OF CONFEDERAL SOVEREIGNTY

Part II has established the *prima facie* feasibility and value of confederal sovereignty for the EU. Contrary to popular belief, European integration does not inherently conflict with sovereignty. The EU can be seen as a logical and attractive confederal evolution of internal and popular sovereignty. An evolution that emulates the federate evolution of sovereignty in America and holds the potential to help realign the national democratic process with a globalizing reality, liberate the sovereign member peoples from their entrapment in a declining state, and establish a direct if secondary popular foundation for the EU.

As a result a confederal conception of sovereignty can help meet the main challenge identified by part I: To close the increasing gap between the EU's confederal basis and its expanding federate superstructure. Closing this gap is vital to sustain the modified confederal form developed by the EU. Without a sufficiently strong basis, the confederal experiment in the EU will in time be forced to federate, or to scale down its federate superstructure and take a step back into the unstable waters of traditional confederation or international organization.

To establish these conclusions, part II first introduced the contradiction generally assumed between sovereignty and integration, and the theoretical deadlocks that flow from this contradiction. It did so by setting out the key tenets of statism and pluralism, which represent two influential yet opposing approaches in the debate on sovereignty and the EU. Statism, as championed by *inter alia* the German *Bundesverfassungsgericht*, postulates the sovereign state as the *conditio sine qua non* for democracy and viable government. Integration must, therefore, remain within the limits required to protect the sovereign state. Pluralism, on the other hand, starts from the reality and desirability of far-reaching integration. Since sovereignty obstructs such real integration pluralism is forced to reject sovereignty altogether. Instead we should embrace a plural reality based on heterarchy, and rely on non-hierarchical mechanisms to coordinate the different authority centres within this pluriverse. Between the convincing arguments of statism and pluralism, however, we seemed forced to abandon either sovereignty or real integration.

Both schools seem to capture one half of EU integration, which simultaneously relies on its Member States and transcends them. At the same time both approaches also fall short, partially because of their inability to incorporate each others strong points. Statism, for instance, is forced to formulate to all kinds of sovereignty-based limits on integration. Limits that tend to be far too sweeping and static, and when applied honestly seem incapable of recognizing even the current reality of integration, let alone guiding its future development. Pluralism seems incapable of establishing any realistic foundation, even though it directly undermines the existing sovereign foundations of authority at the European and the national level.

The sovereignty either/or both schools force us into, therefore, results in a rather unattractive deadlock, and certainly seems incapable of providing the flexible foundation required by a modified confederation as the EU.

To escape this stalemate between sovereignty and integration part II then returned to the concept of sovereignty itself. Chapter 9 provided a conceptual and historical analysis of sovereignty. This analysis demonstrated how internal and external sovereignty form two distinct concepts with very different characteristics and histories, which have nevertheless become increasingly confused over time.

Internal sovereignty has always been concerned with regulating public authority within the polity. The internal sovereign was never absolute, not even under Bodin. Over time, furthermore, internal sovereignty has become increasingly flexible. Through the use of abstract sovereigns and constitutions it eventually allowed total delegation and division of sovereign authority. The synthesis of popular sovereignty, democracy and federalism achieved in the US further increased this flexibility: By locating sovereignty in the people sovereign prerogatives could be freely divided over multiple governments.

External sovereignty, by contrast, only became possible after the invention of internal sovereignty. Only when there was an 'internal' could the 'external' be created. As such external sovereignty is conceptually related to internal sovereignty. Yet at its core it forms a fully distinct concept that has also evolved into the opposite direction of internal sovereignty. To begin with external sovereignty does not concern itself with the key question of internal sovereignty, which is the organization of internal public authority. Instead internal sovereignty is simplified into the assumption that an absolute internal sovereign exists, and that this internal sovereignty is represented by the external sovereign. Where, furthermore, internal sovereignty became increasingly flexible and interlinked with constitutionalism, democracy and the people, external sovereignty moved towards an absolute, indivisible and statal sovereign. This is a powerful construct, which over time has come to dominate our understanding of sovereignty. As such it even eclipsed the internal sovereignty, which receded behind the increasingly seamless legal systems within the state.

Based on this analysis of internal and external sovereignty it was then suggested that the EU should be understood as a next step in the evolution of internal sovereignty. For where from the perspective of external sovereignty the EU indeed seems impossible to square with sovereignty, from an internal conception of sovereignty a far more logical and appealing picture emerges. One that fully fits with the confederal approach developed in part I and the evolution of internal sovereignty itself, and which reveals that it is not so much the EU and sovereignty that are colliding, yet the realm of internal and external sovereignty. A collision that causes some to reject the concept of sovereignty altogether, instead of returning to its primary and flexible internal core.

2   THE FIT AND ADVANTAGES OF CONFEDERAL SOVEREIGNTY

Chapter 10 subsequently did return to this flexible core. It provided an outline of confederal sovereignty, its fit with EU law, and its different advantages.

In line with the internal and popular elements explored in this thesis, this outline of confederal sovereignty took the different member peoples as the sovereign starting point. It is in these peoples that ultimate and primary sovereignty resides. What has then essentially happened with European integration is that these peoples have relocated some of their sovereign authority from their states to the external and non-statal entity that is the EU. They have done so, moreover, reciprocally and in a confederal union with other sovereign member peoples.

This is an important departure from the traditional Westphalian arrangement, premised as it was on the state as the sole recipients of direct sovereign authority and exclusive nexus of internal and external sovereignty. Confederal delegation outside the state undermines the absolute external sovereignty of the Member States, as it propels the internal sovereign directly into the realm of the 'external'. The difference between internal and external sovereignty is, therefore, no longer masked by the state, and the normatively primary internal can come into conflict with the conceptually more absolute external.

Nevertheless this departure does not create a conflict between European integration and internal sovereignty. Quite the opposite: It upgrades internal sovereignty and adapts it to the current global reality it needs to shape. The internally sovereign member peoples are once more placed at the basis of political authority, after their position had been increasingly eroded by the growing dominance of the externally sovereign state, and the decreasing relevance of the internal in today's interdependent world. Any statement that 'the EU conflicts with sovereignty' therefore misses the point: integration fits logically within the federal evolution of internal and popular sovereignty, but empowers internal sovereignty at the expense of external sovereignty.

In addition to its conceptual fit within sovereignty, furthermore, confederal sovereignty also provides a strong legal, normative and evolutionary fit with the EU Treaties and the case law of the Court of Justice. Legally confederal sovereignty conforms to the foundation of the EU in the delegation of sovereign powers, and not sovereignty itself, as also held by the ECJ. Normatively it shares the respect for democracy and self-determination on which the EU is founded. Evolutionary it explains and justifies the increasing and intensifying relation between the EU and the individual.

Having established the overall feasibility and fit of confederal sovereignty chapter 10 subsequently demonstrated and explored several of its advantages and uses for the EU. In line with the two core objectives of part II it was first shown how confederal sovereignty can reduce the apparent tension between sovereignty and integration and the untenable positions that this tension forces us into. To this end we returned to the opposing schools of statism and pluralism. It was illustrated how both rely on unsuitable notions of external sovereignty, and how this leads to the extreme and untenable positions discussed. Then it was shown how both schools might actually be strengthened by switching to a confederal conception of sovereignty.

Statists, for instance, can develop a stronger and more convincing understanding of sovereignty that is based on the normative authority of the people instead of the state. An understanding that will support current and future integration, yet also provides a more flexible and therefore viable defence against excessive integration. This in contrast to the current static and undemocratic defence of the sovereign state, which forms a conceptual and political dead end and traps the people and democracy in the state.

Pluralist, in their turn, may retain most of the cherished plurality in the day to day reality of the EU, but can nevertheless ground and safeguard this pluralism in the ultimate foundation of the people. A foundation that can intervene in the case of fundamental conflict, the Achilles heel of pluralism, but does not reduce the EU to a linear hierarchy. For under a confederal approach neither the EU nor the Member States are to be ultimate or supreme authorities.

From a confederal perspective, therefore, not only the tension between sovereignty and integration is reduced, but so is the tension between statism and pluralism. An outcome that may suggest at least a partial synthesis between the two approaches, and thereby allow the EU to benefit from the strong points in both.

Resolving the contradiction between sovereignty and integration is also instrumental for the second core objective of part II: Grounding the federate superstructure of the EU. Sovereignty stops being one of the obstacles

that integration needs to overcome. Instead sovereignty, with its enormous potential to legitimize and structure public authority, becomes available as part of the solution. It enables a direct if secondary link between the EU and the member peoples. Although the states remain their principal political habitat, the member peoples have directly included the EU in their constitutional system for the delegation of sovereignty authority. The direct connection between the individual and the EU, for instance through citizenship the European Parliament or the direct effect of EU law, form a logical *quid pro quo* for this delegation. It is this link which opens up a path to a sufficiently stable yet still confederal basis for the EU in the sovereign member peoples. Even though it needs to be further developed and institutionalized, it offers the potential for direct though secondary popular legitimacy.

Such a confederal foundation in the sovereign member peoples, furthermore, has several additional advantages. To begin with it explains the relevance of constitutionalism for the EU, even though it is not a state. The EU Treaties after all form an integral part of the national constitutional systems, fulfil the constitutional task of delegating and controlling sovereign authority from the Member Peoples to the EU, and establish a confederal constitutional bond between the members. At the same time the Treaties lack the normative primacy and intensity of national constitutions. The Treaties can, therefore, be seen as subsidiary or secondary constitutions. Labels aside, and comparative caveats applying, constitutional logic and theory can therefore be usefully applied to the EU Treaties.

Second, and linked to the constitutional nature of the EU Treaties, confederal sovereignty can also help in reducing the supremacy conundrum. It allows us to distinguish between the narrow ultimate normative primacy of the national constitutions, and the broader operational primacy of EU law. This primacy of EU law is based on the mutually reinforcing bases of its constitutional nature, the fact that the EU holds sovereign authority from multiple member peoples at the same time, and the fact that these multiple delegations are reciprocal, and hence buffeted by the principle of *pacta sunt servanda*, a classic limit on sovereignty.

   Crucially the ultimate primacy retained by the national constitution is not incompatible with this secondary and confederal form of primacy demanded by the EU. Constitutional courts have demonstrated as much by consistently accepting the supremacy of EU law over non-existential national law. They just cannot accept any challenge to the ultimate authority of the national constitution. This is only logical and suitable in a confederal system, which also does not have to make this ultimate claim. Obviously this retains the potential for conflict between the national and EU level as to what constitutes an existential issue, and where national primacy therefore trumps EU primacy. Yet the existence of a zone of possible disagreement does not alter the fact that, outside this penumbra of doubt, the national and EU claim to supremacy are different and compatible. By allowing us

to distinguish between the primary national supremacy and secondary EU supremacy, therefore, confederal sovereignty softens the primacy conundrum, even if it cannot solve the potential for conflict inherent in a confederal order.

Lastly, and vitally, it was shown how a confederal conception may offer a positive and normatively attractive narrative for the EU. One which casts the EU as a necessary tool for the sovereign peoples to escape the confines of their state, and to realign their influence with the global reality that needs governing. For what use is a purely national vote, no matter how 'sovereign' the state, where the national political decision it determines has no impact on reality? And how sovereign are a people really when they have no choice but to delegate all their authority to an increasingly absolute state?

From this perspective the EU can be understood as a crucial evolution in internal and popular sovereignty that safeguards democracy by updating it. Democracy 2.0 so to speak. Instead of a necessary evil that erodes the democratic glory days of old, the EU can be envisioned as, and subsequently developed into, the entity that saves popular sovereignty and democratic control from globalisation. It becomes a democratic imperative that empowers the people, whereas the rejection of confederal integration equals a refusal to evolve, which historically is a path to extinction only.

Obviously this last advantage of confederal sovereignty contains a significant prescriptive element, and does certainly not describe current popular sentiments. Yet precisely this element of idealism is also in line with the prescriptive nature of internal sovereignty outlined in chapter 9. Just as the federate conception of sovereignty provided a positive democratic narrative for the US, so a confederal conception of sovereignty may provide one for the EU. A narrative that may help realize the democratic potential of a modified confederation by providing direction and impetus for its future development, and allowing people to welcome it.

3   The confederal promise and challenge

Obviously the discussion of confederal sovereignty here has been selective. Even within the limited points discussed more research and analysis is possible and necessary. It is, therefore, most certainly not claimed that anything close to a solution, or even a full conception of confederal sovereignty, has been developed. What has been illustrated, however, is the *prima facie* feasibility and potential of the confederal perspective, and how the notions of internal and popular sovereignty may be part of any more complete confederal conception of sovereignty.

Yet the potential held by the confederal form must still largely be realized. The purposefully abstract confederal construct developed in this thesis must be translated, operationalised and institutionalized. In a sense it forms an artificial skeleton which needs to be supported by constitutional and institutional muscles and tendons, and especially but most complexly, brought to life by some political spirit.

It flows from the nature of confederalism that the confederal potential must be primarily realized at the national level. How to do so requires far more study and specific knowledge, also of the different national constitutional systems, than can be provided here. Accepting these limitations part III will nevertheless apply the central findings of this thesis to two key challenges of reality, for it is there that constitutional theory should aim to contribute.

First part III will engage with the dilemma of adapting the democratic process itself to a confederal reality. For it is in the area of democracy – and therefore the political spirit required to bring the EU constitutional framework to life – that a fundamental weakness still lies. One which needs to be addressed for the long term stability of a confederal union, and to substantiate the direct link between the EU and the member peoples established in part II. To this end, part III will analyze the capacity of the confederal perspective to adapt the focus and content of the democratic process – both at the European and at the national level– to a confederal organization of public authority. A potential that flows precisely from rediscovering the people as the ultimate locus of political authority, at least at the conceptual constitutional level.

Second, and as a final challenge, the confederal approach developed in this thesis will be applied to the EMU crisis. To what extent can the Euro crisis be explained from a confederal perspective, and even more tentatively, what would be a proper confederal response?