



INSIGHT

WHAT CHIMPANZEES CAN TEACH THE EU: OR WHY THE EU SHOULD EMBRACE SOVEREIGNTY AS PART OF HUMAN NATURE

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ABSTRACT: This *Insight* makes four key claims. First, evolutionary biology and the study of chimpanzees show that social animals have an emotional need for a stable, formal hierarchy. Second, sovereignty might be understood as a highly evolved and abstract solution to fill this basic need. Third, global interdependence and European integration challenge the existing formal hierarchy and sovereignty constructs within Member States. The EU therefore disrupts the existing formal hierarchy without providing a viable formal hierarchy in return. This reopens primal questions about hierarchy, identity and social stability. Fourth, instead of fighting sovereignty, the EU should therefore accept the underlying basic need for formal hierarchy as part of the human condition. Like every constitutional construct before it, the EU cannot go against the grain of human nature, and must therefore learn to accept, protect, and perhaps even celebrate some forms of formal hierarchy, including sovereignty, as well as the human emotions that come with it. Luckily, an evolutionary understanding of formal hierarchy and sovereignty also allows us to reconcile sovereignty with European integration. European law also offers sufficient footholds to embrace such an evolutionary concept of sovereignty.

KEYWORDS: sovereignty – EU – Brexit – evolution – chimpanzees – formal hierarchy.

I. INTRODUCTION: OVERCOMING SOVEREIGNTY?

For a long time, many hoped that European integration would put sovereignty to pasture.¹ In an increasingly interdependent reality, such a primitive and nationalistic concept

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¹ See for some leading accounts N McCormick, 'Beyond the Sovereign State' (1993) *ModLRev* 1; N McCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press 1999); or N Walker, 'Late Sovereignty in the European Union' in N Walker (ed.), *Sovereignty in Transition* (Hart 2006) 3. For a more elaborate discussion of these theories see A Cuyvers, *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* (Wöhrmann 2013) esp. ch. 8.



should and would be transcended. Having achieved cosmopolitan bliss, sovereignty could finally be buried as a barbaric relic of the past, perhaps together with history itself.²

For those still hoping, Brexit must have been a rude awakening. Under the rallying cry of taking back control, sovereignty proved one of the key emotional and political drivers.³ Instead of an obscure theoretical concept, sovereignty acted as an emotional turbocharger which helped catapult leave over the finish line four per cent points ahead of the economy-focused remain camp. When we place Brexit in its broader context, with the growth of sovereignty-touting parties in, amongst others, Austria, Belgium, France, Germany, Hungary, Italy, Poland, Spain and the Netherlands, one can only conclude that sovereignty is far from gone. Rather, it is back, and with a vengeance.

So why has the obvious reality of economic, political, social, digital, environmental and geo-political interdependence not done away with sovereignty? Why do voters cling to an obvious fiction of autarky and absolute self-rule? And what should the tenacity of sovereignty mean for our thinking on regional integration and the EU?

In answer to these questions, this *Insight* makes four key claims. First, the emotional need for a form of *formal hierarchy* is an inherent part of human nature. As social creatures, humans have an evolutionary engrained need for some point of ultimate, formal authority which stabilises the inherently fluctuating power relationships in our social groups. There must be an alpha with the capacity to prevent or pacify disputes that might otherwise rupture our social framework.

Second, sovereignty can be understood as a highly evolved and abstract solution to fill this basic need. Instead of selecting one alpha to lead our tribe, humans have come up with ever more abstract entities to fulfil the human and societal need for a formal and stable hierarchy in ever larger and more diverse groups. From kings to crowns, states, peoples, nations, flags or constitutions, ever more abstract entities have been created and bestowed with ultimate authority.

² For some of the more normative rejections of sovereignty see for example, D Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press 1998) for instance 135; N McCormick, *Questioning Sovereignty* cit. 117; J Habermas, *The Inclusion of the Other: Studies in Political Theory* (Polity Press 1999) 118; NW Barber, 'Legal Pluralism and the European Union' (2006) ELJ 328; M Poirares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed.), *Sovereignty in Transition* cit. 501; or I Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) ColumJEurL 349. These rejections of course build on other literature, which more generally sees sovereignty as inherently problematical in itself. See for example already HJ Laski, *The Foundations of Sovereignty and Other Essays* (Brace and Company 1921) and SD Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999).

³ HD Clarke, M Goodwin and P Whiteley, *Brexit: Why Britain Voted to Leave the European Union* (Cambridge University Press 2017). For further discussion also see A Cuyvers, 'Brexit and the Real Democratic Deficit: Refitting National and EU Democracy for a Global Reality' in E Ellian and R Blommesteijn (eds), *Reflections on Democracy in the European Union* (Eleven Publishing 2020) ch. 5.

The third claim is that, by apparently challenging national sovereignty, and more generally blurring lines of formal hierarchy into a pluralist, Escher-like picture, the EU only *reopens* the primal questions about hierarchy, identity and social stability that national conceptions of sovereignty aim to pacify. As a consequence, European integration does not make sovereignty obsolete but rather leads to an increased longing for clearer formal hierarchy, including sovereignty, at a very primary, instinctive level. What is more, the claims of formal authority that the EU itself makes may also deviate too much from its actual power, which can lead to further unrest.

Based on these three claims, the fourth and last claim is that the EU can and should therefore accept the need for formal hierarchy as part of the human condition. As the federalist already argued, when designing a constitution one must start from the realities of human nature, not from what ideal (cosmopolitan) citizens would look like. Just as we should work with greed and ambition instead of against it, we should, therefore, work with the need for formal hierarchy, and therefore sovereignty, and not against it.⁴ The EU must therefore learn to accept, protect, and perhaps even celebrate sovereignty and the human emotions it is based on.⁵

Once we recognise the human and evolutionary root of sovereignty, moreover, the concept no longer forms an inherent obstacle to European integration. As history has shown us, sovereignty, and its conceptual predecessors, have so far proven flexible enough to go from tribes to kingdoms to federal states that govern millions, sometimes billions of people.⁶ As long as we respect its fundamental purpose and nature, meaning that our conception of sovereignty must provide for a sufficiently stable formal hierarchy, a further evolution of sovereignty should be possible. In turn, this means that European integration might be reconciled with sovereignty and the underlying human needs it serves. In conclusion, this *Insight* therefore tentatively explores some possibilities for EU law to embrace and support national sovereignty instead of challenging it.

II. METHOD, LIMITATIONS AND STRUCTURE

The above, admittedly bold, claims rest on a rather experimental approach. Instead of starting from political or constitutional theory, this *Insight* starts from evolutionary biology, and therefore from human or even animal nature. This approach fits with the core claim that sovereignty should not be understood as a platonic ideal or a self-

⁴ J Madison, A Hamilton and J Jay, *The Federalist Papers* (originally published between 1887 and 1788) (Penguin 1987), for example paper LI, "Ambition must be made to counteract ambition. [...] But what is government itself but the greatest of all reflections on human nature" 319.

⁵ See on the "intensely emotional side of human politics" also F de Waal, *Mama's Last Hug: Animal Emotions and What They Tell Us about Ourselves* (Norton 2019) 176.

⁶ See for an impressive and concise overview FH Hinsley, *Sovereignty* (Cambridge University Press 1986).

standing theoretical or legal construct. Instead, sovereignty should be understood as an answer to a basic question facing all social animals: how to create sufficiently stable and harmonious groups when actual power fluctuates on a daily basis?

As this *Insight* explores the evolutionary foundations and human needs underlying sovereignty, it explicitly does not aim to provide anything close to a full or final definition of sovereignty.⁷ To the contrary, the claim is that sovereignty is much more flexible than often assumed, as it needs to evolve along with human society to keep fulfilling its function. At the same time, some working definition of sovereignty is required to anchor and delineate the discussion. To this end, this *Insight* uses the short and clear definition of Hinsley, who describes sovereignty as “the idea that there is a final and absolute authority in the political community” and that “no final and absolute authority exists elsewhere”.⁸ This definition contains the two core elements of finality and absoluteness which can be found in many definitions, recognises sovereignty as authority instead of actual power, and is relatively thin in normative terms.⁹ The argument will therefore be that the creation of such an absolute and final authority has proven to be an efficient way of serving the evolutionary need for formal hierarchy, and can continue to do so in the EU, even if this need might also be satisfied in other ways.

To support this approach, section 3 focusses on the work of the leading evolutionary biologist Frans De Waal.¹⁰ He demonstrates how chimpanzees have developed a form of *formal* hierarchy to order their groups. It will be argued that this formal hierarchy can be understood as a form of proto-sovereignty, and therefore holds important clues as to the evolutionary roots and functions of sovereignty. Section 4 subsequently argues that this primitive conception of formal authority gradually evolved as human societies became larger, more complex and more divers. It does so by illustrating how,

⁷ Obviously it is highly doubtful whether it is even possible to ever provide a full or final definition for such an intensely contested, social concept. See for instance J Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press 1995), especially ch. 2.

⁸ FH Hinsley, *Sovereignty* cit. 1 and 26. This definition also avoids the descriptive fallacy of conflating sovereignty with actual power. Cf. WG Werner and JH De Wilde, ‘The Endurance of Sovereignty’ (2001) *European Journal of International Relations* 283 and 285. Also see the four misunderstandings identified by B Van Roermund, ‘Sovereignty: Unpopular and Popular’ in N Walker (ed.), *Sovereignty in Transition* cit. 35 ff.

⁹ For a more detailed discussion of the concept of sovereignty see A Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples* cit. 247 ff. It is recognised that the definition of Hinsley is, in his own view, closely related to the concept of the state, and that chimpanzees do not have states. This does not, however, stand in the way of using his working definition, already because Hinsley himself also repeatedly stresses the underlying function of sovereignty to help structure effective societies. See for example FH Hinsley, *Sovereignty* cit. 17, 25 or 217, where he states that: “[Sovereignty] is the concept which maintains no more – if also no less – than that there must be an ultimate authority within the political society if the society is to exist at all, or at least if it is to be able to function effectively”.

¹⁰ See especially F De Waal, *Mama's Last Hug* cit.; F De Waal, *Chimpanzee Politics: Power and Sex among Apes* (Johns Hopkins University Press 2007), and F De Waal, *De aap in ons: Waarom we zijn wie we zijn* (Olympus 2017).

over the course of history, the evolutionary and social questions underlying sovereignty received an ever more *abstract* answer. This section especially focusses on the invention of the doctrine of “the King’s Two Bodies” in Tudor England, which exemplifies process of sovereign abstraction.¹¹

Combining the insights from sections III and IV, section V argues that the EU should not try to overcome sovereignty but should try to become the next evolution of sovereignty or at least the next layer of abstraction overlaying more primitive notions of sovereignty. It also draws some general conclusions and attempts to translate some of these admittedly rather abstract claims into more concrete legal and practical applications.

Obviously, any conclusions reached here can only be tentative and preliminary. The author is very much aware that the approach chosen here is highly explorative, makes significant leaps, and that bringing in arguments from evolutionary biology, social psychology and legal history leads a lawyer onto some very thin ice indeed. The aim, therefore, is primarily to open new, more fruitful perspectives on European integration, formal hierarchy and sovereignty, as well as to better connect to insights from other disciplines that we will sorely need to address the very real push-back in today’s society against globalisation and regional integration. For instead of trying to “educate” voters into becoming the super-human citizens required by integration, it seems more promising to ensure that integration fits with the evolutionary core of human nature and stop deriding this nature as primitive or stupid.

III. CHIMPANZEE HIERARCHY AND PROTO-SOVEREIGNTY

So why look at chimpanzees? The central hypothesis of this *Insight* is that advanced social animals, including humans, have a very basic, evolutionary need for formalised order.¹² An additional but separable claim is that sovereignty can, in part, be understood as a social tool designed to fill this need. Studying the highly advanced social ordering of chimpanzee groups allows us to test these hypotheses. If correct, after all, one should be able to identify some form of sovereignty or proto-sovereignty in chimpanzees groups.

The validity of this comparison is supported by the eye-opening similarities between chimpanzee and human social organisation.¹³ As Frans De Waal writes in his

¹¹ EH Kantorowicz, *The King’s Two Bodies: A Study in Medieval Political Theology* (Princeton University Press 1997).

¹² Under the social intelligence hypothesis, the large brains of primates may actually have evolved precisely because they needed to deal with an increasingly complex group life. Humans share this evolutionary path with other advanced primates, even if we are not directly related, which means that one could expect similar or analogue social inventions such as formal hierarchy or sovereignty to develop when faced with similar challenges, such as keeping large and interactive social groups stable. Cf. already H Kummer, *Primate Societies: Group Techniques of Ecological Adaptation* (Aldgate 1971) for example 36.

¹³ See also F De Waal, *Mama’s Last Hug* cit. 50-51 on the continuity between ape and human behaviour and emotions and 177, where De Waal uses Brexit as an example of the importance of emotions in politics.

seminal book “Chimpanzee Politics”: “the social organisation of chimpanzees is almost too human to be true”.¹⁴ This even leads De Waal to the conclusion that chimpanzee “technical skills are inferior to ours, but I would hesitate to make such a claim with regard to their social skills”.¹⁵ When looking at the intricate social interactions between chimpanzees, moreover, and especially the interplay between a formalised hierarchy and a more fluid informal power-balance, it is hard not to draw a comparison with the way sovereignty orders human society and political organisation.

What is more, comparing with chimpanzees allows us to escape embedded assumptions and dogmas in our current debates on regional integration and globalisation. Much of the current debate, for example, links sovereignty with the nation-state. This tends to lead to an impossible choice: you can either have sovereign states or effective regional integration, but not both. Tracing sovereignty back to an evolutionary foundation which predates the state may allow us to escape this dilemma. Instead of trying to apply existing statist conceptions of sovereignty to a globalising reality, we can then try to design a new conception of sovereignty, which goes back to the original, underlying need. Such a conception should therefore meet the evolutionary needs behind formal authority and sovereignty but also fit with our current reality in which both nation states and far reaching regional integration need to co-exist.

Last but not least, the suggested evolutionary approach allows us to better grasp the intensely *emotional dimension* of sovereignty. Why can sovereignty elicit such intense emotions, for example during the Brexit campaign? A more primal, evolutionary conception of sovereignty may explain why a loss of formal authority or sovereignty can be so threatening. More importantly, it may help us to develop a conception of sovereignty, and European integration more generally, which is more in sync with human nature and human emotions than the current rationalistic approach which tends to consider “emotions” as inherently suspect.

Ultimately, therefore, the comparison with chimpanzees rests on the claim that many of our deepest emotions and behaviours, including the desire for a clear formal hierarchy and hence a sovereign, have evolutionary roots, and can therefore also be found in other advanced social primates like chimpanzees.¹⁶ In that sense Aristotle, and the federalists with him, impressively presaged current insights from evolutionary biology and psychology when they described humans as “political animals”. Again, in the words of De Waal:

¹⁴ F De Waal, *Chimpanzee Politics* cit. 4.

¹⁵ *Ibid.* 39.

¹⁶ N.B. it is not claimed that humans are directly derived from chimpanzees in an evolutionary sense. Humans and chimpanzees only share a common ancestor which went extinct approximately six million years ago. The claim here is solely that the need for formal hierarchy goes back to deep evolutionary roots which humans share with chimpanzees (and other advanced social mammals). See also F De Waal, *Mama's Last Hug* cit. 18.

“when Aristotle referred to man as a *Political Animal* he could not know just how near the mark he was. Our political activity seems to part of an evolutionary heritage we share with our close relatives. If someone had said this to me before I started working at Arnhem Zoo, I would have rejected such an idea as just too neat an analogy. What my work at Arnhem has taught me, however, is that *the roots of politics are older than humanity*”.¹⁷

To support these claims, the next section briefly provides the necessary factual background on the intriguing social and political life of chimpanzees. Section III.2 then focusses on the distinction between social power and formal hierarchy in chimpanzee groups. Section III.3 subsequently argues that the notion of formal hierarchy as developed in chimpanzee groups can be understood as a form of proto-sovereignty, which acts as a stabiliser and shock-absorber for fluctuations in real social power, and thereby improves group stability and effectiveness.

III.1. THE SOCIAL AND POLITICAL LIFE OF CHIMPANZEES

Like humans, chimpanzees are intensely social animals.¹⁸ Their survival and procreation depend on their groups and on how well they function within these groups.¹⁹ As a result, chimpanzees spend significant time and energy on social processes, and their social mechanisms are highly developed and sophisticated.²⁰

One vital fact is that the social hierarchy of chimpanzees is not a simple hierarchy where the physically strongest male holds total power as the alpha.²¹ Precisely because chimpanzees are such social animals, power fluctuates depending on changing coalitions. Chimpanzee hierarchy is, therefore, “flexible” or “plastic”.²² In “Chimpanzee Politics”, De Waal masterfully demonstrates this by carefully tracing two leadership changes in the chimpanzee colony of Arnhem Zoo.²³ The Arnhem colony consisted of approximately 25 individuals with four adult males.²⁴ Between 1974 and 1978, the alpha

¹⁷ F De Waal, *Chimpanzee Politics* cit. 207.

¹⁸ *Ibid.* 99-100.

¹⁹ F De Waal, *Chimpanzee Politics* cit. 105. For example, male chimpanzees “stand alone among our close relatives in their ability to overcome the basic competitive tendencies amongst all male animals and to achieve a high degree of cooperation. [...] chimpanzee males contain and ritualise their competitiveness because of the need to form a common front against their neighbours”. Also see *ibid.* 105, 154, 234.

²⁰ Primates even have dedicated networks in their brains to help them process social information. J Sliwa and WA Freiwald, ‘A Dedicated Network for Social Interaction Processing in the Primate Brain’ (2017) *Science* 745-49.

²¹ De Waal calls this the “naïve assumption”. See F De Waal, *Chimpanzee Politics* cit. 76.

²² *Ibid.* 81; F De Waal, *Mama’s Last Hug* cit. 134.

²³ Notice that De Waal thereby also demonstrates that chimpanzees fight over formal authority within an existing group, without this leading to a group splitting. This undercuts Hinsley’s argument that such conflicts can only occur within a state, and hence sovereignty can only exist within a state. See FH Hinsley, *Sovereignty* cit., *inter alia* 8 and 17.

²⁴ F De Waal, *Chimpanzee Politics* cit. 42.

changed twice as three males, Yeroen, Luit and Nikki, vied for power in a way that could only have impressed Machiavelli and fans of the West Wing and House of Cards alike.

From 1974 to mid-1976, Yeroen was the clear alpha. He received by far the most signs of submission from others and was responsible for almost 75 per cent of all matings in the group.²⁵ De Waal, for example, describes how Yeroen, after a display of strength, “would seat himself, and the other apes would hasten to pay their respects to him. Like a king he accepted his mass homages as his due [...]”.²⁶ On 21 June 1976, however, the first open challenge to his leadership emerged. Luit mated with a female a mere ten metres from Yeroen. He also challenged Yeroen several times by “displaying” to him and even gave Yeroen a “resounding smack”.²⁷ This proved to be the opening salvo for a two-month long process during which Luit gradually isolated Yeroen from the rest of the group and progressively dissolved the different coalitions on which Yeroen’s authority turned out to rest.

During these two months, the relative physical power of Yeroen and Luit did not change much. Yet the outcome of the three physical fights between Yeroen and Luit that took place in this time were markedly different. The first fight was initiated and won by Yeroen, with the support of the females. The second fight was also won by Yeroen, but Luit fought back much harder and even dared to bite Yeroen, as social support for Yeroen had already diminished. In the third and last fight, Yeroen was socially isolated. Luit now initiated and won the fight, which underscored the shift in hierarchy. As De Waal concludes: “in view of the fact these three fights took place within a few weeks of each other an explanation cannot be sought in a change in the physical powers of the two males; the outcomes in fact reflect change in the *relative social status*”.²⁸

A similar picture emerged in the second leadership change. After Luit had become the alpha, Yeroen, the former alpha, also allowed Nikkie to surpass him in hierarchy. Yeroen, therefore, went from number one to number three in the formal hierarchy of the colony. As a result of his rise to number two, however, Nikkie now became a viable threat to the alpha status of Luit. To counterbalance this threat, Luit started a coalition with Yeroen against Nikkie. Hence, the numbers one and three banded together to control the number two.²⁹ *De facto*, this gave Yeroen enormous influence over Luit, whose throne now depended on the support of Yeroen. After several months, however, the triangular relation between Luit, Nikkie and Yeroen started to change. Yeroen started to shift his support to Nikkie, and Nikkie was starting to act less submissive to Luit. A mere year after he had become alpha, Luit was dethroned by Nikkie, with Yeroen acting as kingmaker.³⁰

²⁵ *Ibid.* 164.

²⁶ *Ibid.* 77.

²⁷ *Ibid.* 85.

²⁸ *Ibid.* 103.

²⁹ *Ibid.* 121.

³⁰ *Ibid.* 127.

With his careful observation of these leadership changes De Waal demonstrated that changes in alpha position did not merely depend on physical strength. To a large extent, these changes depended on social intelligence and the capacity to form and maintain sufficiently powerful coalitions. Social power, therefore, was not a static fact, but rather a fluid reality like quicksilver.

III.2. SOCIAL POWER VERSUS FORMAL RANK

Precisely this fluid reality of power, moreover, led De Waal to a distinction between *social power* and *formal rank*, which is of central interest for EU integration. Social influence, or power, concerns who can decide concrete outcomes in a specific situation, for example when a conflict arises over some food. In the words of De Waal, it reflects “who can defeat whom and who weighs most heavily when a conflict in the group occurs”. Importantly, the outcome of such conflicts “is not 100 per cent predictable, particularly since chimpanzees constantly form shifting alliances. [...] A young chimpanzee of not more than two or three can sometimes put an adult male or female to flight or even coerce them into doing something”.³¹ Sometimes, moreover, even the alpha loses out. As De Waal notes: “the dominant ape sometimes comes off worse. It is quite normal among chimpanzees for low-ranking group members to protest aggressively at being slapped, and they regularly put the dominant ape to flight or even physically overpower him, especially when they combine forces”. As a result, every now and then “even the leader is chased up a tree”.³²

Social power, therefore, is relatively fluid and context dependent. As coalitions shift, or particular individuals happen not to be around, the relative power of each individual chimpanzee shifts. This fluidity of social power may be recognisable to anyone who has ever engaged in any form of politics, EU, faculty or otherwise.

Formal rank, on the other hand is more rigid and static, and does not depend on the outcome of individual conflicts. De Waal describes this as “*frozen dominance relationships*”.³³ In ordinary times, chimpanzees each have a particular formal rank in the group, which is known and respected by all. Chimpanzees acknowledge this formal rank through so-called “submissive greetings”.³⁴ Such a greeting is

“a sequence of short, panting grunts known as pant-grunting. While he utters such sounds the subordinate assumes a position whereby he looks up at the individual he is greeting. In most cases he makes a series of deep bows that are repeated so quickly one after the other that this action is known as bobbing. Sometimes “greeters” bring objects

³¹ F De Waal, *Chimpanzee Politics* cit. 80.

³² *Ibid.* 81.

³³ *Ibid.* 81-82.

³⁴ *Ibid.* 78.

with them (a leaf, a stick), stretch out their hands to their superior or kiss his feet, neck or chest".³⁵

Interestingly, submissive greetings are *solely* used as "a kind of ritualised confirmation of the dominance relationship".³⁶ In other words, chimpanzees have developed a dedicated social ritual for the sole purpose of recognising formal rank. This shows the importance of formal hierarchy for their social organisation.

Crucially, social power and formal rank are related, but not always aligned. As discussed, formal rank does not determine the outcome of every conflict. Even the alpha does not get his way all the time. Losing an individual conflict, moreover, does not automatically undermine formal rank. An alpha can lose an individual conflict yet remain the alpha.³⁷ What is more, there may be times where the alpha does not even hold most social power overall. De Waal notes that "formal rank and power generally overlap; however, in some cases, rank can become dissociated from power".³⁸

A clear example of dissociation between formal rank and social power can be found during the early reign of Nikkie. Although Nikkie was accepted by all as the formal alpha, Yeroen turned out to be the savvier politician and exerted significant social influence as the power (or brain) behind Nikkie's throne. One clear indicator of how much Yeroen's social power exceeded his formal rank can be found in his mating activity, a more straightforward measure for chimpanzee social power than any Times 100 list. In the first year of Nikkie's reign, for example, Yeroen accounted for more than 30 per cent of all matings, whereas Nikkie, the formal alpha, only accounted for some 20 per cent.³⁹

Based on De Waal's work, it can be concluded that formal rank is a *social construct* which is related to social power but also distinct from it. Formal rank is not necessarily affected by the constant fluctuations in real social power from one situation to the next. At the same time, the formal hierarchy cannot deviate from social power too much for too long. As De Waal notes:

"In other words, the position of a dominant ape can become untenable. Just how chimpanzees determine this moment is not known, but it seems clear that the course of their aggressive encounters constitutes the main source of information in this respect. For

³⁵ *Ibid.*

³⁶ *Ibid.* 79.

³⁷ Interestingly this also creates the social space for revenge and retaliation against the alpha without undermining the formal hierarchy, creating a further means of deflating social tension within the existing formal hierarchy. See F De Waal, *Mama's Last Hug* cit. 134.

³⁸ F De Waal, *Chimpanzee Politics* cit. 82.

³⁹ *Ibid.* 164. Note that his was 10 per cent less than before Nikkie became the alpha, meaning that, at least on this rather important (chimpanzee) metric, Nikkie lost social power to gain formal rank. Also note, however, that in his second year as alpha things changed, as Nikkie's percentage of all matings surged to 50 per cent and those of Yeroen dropped to 20 per cent. Being the power behind the throne can, as history has also shown, be a hazardous position as well.

example, if the subordinate party begins to win conflicts more and more often, or if he at least regularly produces fear and hesitation in the dominant party, this will not escape him. If this shift in the relationship persists, the 'greetings' between them will gradually become no more than hollow formality".⁴⁰

Formal rank, therefore, can deviate from social power, as long as it stays within a certain bandwidth. As developed in the next section, it is submitted that this construct of formal hierarchy, and its relation to real power, is already relevant for the EU in itself. To begin with, there might be a significant discrepancy between the formal hierarchy the EU claims and its real power, which may be related to some challenges of EU authority by national challengers. Going one (admittedly speculative) step further, formal hierarchy might even be understood as a form of proto-sovereignty: a social construct which fulfils several useful functions in complex social groups, precisely by abstracting from real social power and creating a stable hierarchical framework.

III.3. SOVEREIGNTY AS A STABILISER AND SHOCK-ABSORBER OF FLUCTUATING REAL POWER

As aptly demonstrated by the Arnhem colony, in large and complex social groups real power is fluid. This creates tension and uncertainty and can seriously undermine the cohesions, stability and effectiveness of a group.⁴¹ Groups who manage to reduce this uncertainty therefore have an evolutionary advantage, as group members can spend their energy more productively than constantly fighting over power or tracking power-struggles between others.

Creating a formal hierarchy is one possible solution to manage the fluidity of power. A formal hierarchy brings stability and clarity. It removes the need to constantly test relative power, and hence to engage in conflicts. What is more, a clear formal hierarchy also creates the stable environment required to contain the social conflicts that inevitably do break out. For example, a fight over a banana, or a rule of law mechanism, can remain just that, without escalating into a leadership challenge and threatening the stability of the group as a whole.

To be stable, however, a formal hierarchy cannot depend too directly on real power. If formal hierarchy depended on real power, it would be just as volatile. Formal hierarchy, therefore, must act as a sort of *shock-absorber for power-fluctuations*. It must smoothen out the volatility in the day-to-day fluctuations of power and reflect a more stable, underlying consensus of the group about where formal power lies or should lie. This necessarily means that formal power must abstract from real power to a certain extent, and should

⁴⁰ *Ibid.* 82. Consequently, there is a certain bandwidth within which formal hierarchy must remain *vis-à-vis* real power, for the social construct to hold.

⁴¹ F De Waal, *Mama's Last Hug* cit. 181: once established, a hierarchical structure eliminates the need for conflict.

be based, at least in part, on different criteria than real power. To be useful, formal power must not be reducible to mere real power. At the same time, formal hierarchy cannot deviate from real power too much for too long.⁴² When the gap between formal hierarchy and real power becomes too big, the formal hierarchy will be challenged.⁴³

It should also be noted that in Arnhem, as long as the formal hierarchy was no longer clear or stable, the chimpanzees suffered from significant stress and anxiety. As soon as the formal hierarchy was re-established, however, calm returned. During the first leadership struggle between Yeroen and Luit, for example, it took 72 days of conflict before Yeroen for the first time formally greeted Luit, acknowledging a new formal hierarchy. To be fair, this is still faster than some former presidents, yet during these 72 days, the entire colony was on edge and far more aggressive. This tension disappeared once the formal hierarchy was clear again. As De Waal notes: "Within a week the group was enjoying uncommon peace. Two weeks later the former rivals were even playing with each other again, which they had not done for a good three months".⁴⁴ De Waal concludes from this just how important a stable formal hierarchy is:

"A stable hierarchy is a guarantee of peace and harmony in the group. And the figures back me up on this: from 1976 through 1978 there were a total of thirty-seven serious fights between adult males, the majority of which (twenty-two) took place in periods when the individuals involved were not 'greeting' each other. These 'greetingless' periods together made up less than a quarter of the total. This means that the risk of violence, however small in general terms, was almost five times as high when formal dominance relations were disrupted".⁴⁵

At this point, it becomes hard to ignore the parallel with seminal works on sovereignty, such as the "Six Livres" of Bodin or "Leviathan" by Hobbes.⁴⁶ These authors strongly base the need for a very clear and stable formal hierarchy, and therefore an absolute sovereign, on the need for safety and survival.⁴⁷ Both wrote during turbulent times where the formal

⁴² Cf. in this regard the requirement of a "structural shift" in competences as required by the German Constitutional Court before there can be a manifest breach of German sovereignty and identity (see German Federal Constitutional Court 6 July 2010 2 BvR 2661/06 Honeywell).

⁴³ Alphas appear to be acutely aware. Research has shown that stress levels in the alpha male are just as high as in the males lowest in the hierarchy. For apes as well, it is stressful at the top. F De Waal, *Mama's Last Hug* cit. 188.

⁴⁴ F De Waal, *Chimpanzee Politics* cit. 111.

⁴⁵ *Ibid.*

⁴⁶ JH Franklin, *Bodin: On Sovereignty* (Cambridge University Press 2007), and T Hobbes *Leviathan* (Cambridge University Press 1991).

⁴⁷ Please note that this analogy does not accept the view of humans as inherently aggressive and warlike, which seems to underlie the views of at least Hobbes. Even if humans, or primates, have a strong tendency towards the prosocial and are not inherently aggressive or violent, however, one needs coordination and formal hierarchy. In fact, the choice for a formal hierarchy may then not come for fear of war, but because, already at a physiological, biological level, we as social animals prefer stability and harmony

hierarchy was overturned or severely threatened. Without an alpha, they concluded, lives become nasty, brutish and short, or at least much more stressful and unpleasant.

Based on the analysis above, two claims are submitted. Firstly, a stable formal hierarchy, which does not deviate from real power too much, is important for social animals. Without a clear and stable agreement on where ultimate, formal authority lies, we feel insecure and stressed. What is more, where the formal hierarchy deviates too much from real power, challengers, populist or otherwise, will emerge to claim more formal authority for themselves, leading to further insecurity. As will be discussed further below, this by itself already raises interesting questions for the EU, which formally claims absolute supremacy but also faces the real power of its Member States and national politicians.

Secondly, and more speculatively, it is submitted that the system of formal hierarchy as developed by chimpanzees can be seen as a form of *proto-sovereignty*, a social construct designed to meet the need for relatively stable power relations between group members.⁴⁸ Sovereignty then becomes a social tool which evolved over time to fulfil the need we humans have, as intensely social animals, for a stable hierarchy within which we can function and coexist.

Of course, the human concept of sovereignty has by now become much more complex and abstract than the formal hierarchy between chimpanzees. We have sovereign states and peoples, not sovereign alpha males.⁴⁹ It is submitted, however, that this is a difference in quantity, not in quality. First of all, the underlying construct and function remains the same: the creation of a stable hierarchy within which social interactions, including conflicts, can take place. Secondly, and crucially, the process of abstraction itself forms part of the very essence of formal hierarchy or sovereignty. As discussed above, a formal hierarchy must abstract from the reality of power to function, otherwise the formal hierarchy would be just as volatile as the power reality it is supposed to smoothen. What is different between chimpanzee formal hierarchy and human sovereignty, therefore, is not the abstraction from real power as such, but the level of abstraction and how far formal power is allowed to deviate from real power before a correction sets in. Thirdly, the claim here is not to provide a particular definition of sovereignty, but rather to clarify the underlying evolutionary function of sovereignty. If cor-

precisely because we are pro-social and living in a stable group is a vital survival strategy for us. Cf. also F De Waal, *Mama's Last Hug* cit. 196.

⁴⁸ Cf. in this regard also the link that Hinsley draws between sovereignty and the stable and effective functioning of groups, as well as the gradual development of sovereignty as a new tool for an existing challenge, for example where he finds that: "sovereignty at its first inception has still been only a new solution of an existing problem, a new way of thinking about power and rule, and however novel this solution may have been when first formulated, it has still been only a development out of earlier solutions of that problem". See FH Hinsley, *Sovereignty* cit. 25.

⁴⁹ Some current world leaders may of course disagree with this analysis or even level of abstraction.

rect, this still allows for many different conceptions of sovereignty as long as they fulfil this evolutionary need by providing a clear ultimate formal authority.

To further explain and support these claims, the next section zooms in on one period in history where the process of increased abstraction in human sovereignty becomes very clear, namely the invention of the doctrine of “the King’s two bodies” in the Tudor era. It then zooms out again to look at the process of sovereign abstraction more generally. Once this process of abstraction has been set out, the last section will return to the EU, and ask how an evolutionary concept of sovereignty should affect our thinking on European integration and EU law.

IV. ABSTRACTING THE ALPHA: HOW THE KING GOT TWO BODIES

Modern human societies are much larger and more complex than chimpanzee groups. Consequently, they require more stability and permanence to function. For example, institutions such as property or democratic government cannot depend on the lifespan of the current alpha alone. Our complex societies, therefore, require a formal hierarchy which increasingly *abstracts* from real individuals and attaches formal hierarchy to more abstract and potentially permanent entities.

In line with this narrative, this section makes three points. First, humans have created increasingly abstract sovereigns to support large and complex societies. Second, abstraction should not be mistaken for redundancy, as the fundamental evolutionary need underlying sovereignty remains. Third, abstracting the sovereign creates conceptual space, which the EU can use to respect national sovereignty, and the emotional need behind it, without endangering effective integration.

To support these points, this section first focusses on one particularly illuminating example of sovereign abstraction, being the Tudor doctrine of “the King’s Two Bodies” (section IV.1). Subsequently, it is argued that this Tudor doctrine can be understood as part of a general trend whereby ever more abstract, absolute and absent sovereigns were created to fill the need for a long-term, stable hierarchy in complex societies (section IV.2). Lastly, it is argued that the EU should not misinterpret the impressive human capacity for trusting abstract and absent sovereigns as the demise of formal hierarchy or sovereignty. Instead, it should use this capacity to help create a new sovereign abstraction that can fulfil our human need for a stable formal hierarchy in our globalising reality (section IV.3).

IV.1. INVENTING “THE KING’S TWO BODIES”

In Tudor England, the King had become the bedrock of the constitutional and legal system. Essential elements of law and society, including the validity of legislation and property, depended on the King. Consequently, there was a need for a perfect and

permanent King.⁵⁰ Yet time again even kings proved to be flawed and mortal. So how to create a formally flawless and eternal sovereign within the confines of mortal flesh?

The Tudor jurists found a two-step solution. The first step, with clear religious roots, was the discovery that the King actually had *two* bodies.⁵¹ One of these was his “Body natural”, which was his flawed, mortal body. The other was the “Body eternal”, also known as the “Body politic”, which was immortal and flawless. The King, therefore, was both flawed and mortal and flawless and immortal at the same time:

“For the King has in him two Bodies, viz., a Body natural and a Body politic. His Body natural (if it be considered in itself), is a body moral, subject to all Infirmities that come by Nature or Accident, to the Imbecility of Infancy or old Age [...]. But his Body politic is a Body that cannot be seen or handled, consisting of Policy and Government, and constituted for the Direction of the People, and the Management of the public weal, and this Body is utterly void of Infancy, and old age, and other natural Defects and Imbecilities, which the Body natural is subject to, and for this Cause, what the King dies in his Body Politic, cannot be invalidated or frustrated by any Disability in his natural Body”.⁵²

Yet how do these two bodies relate and co-exist? This question triggered the second step of the Tudor solution, which was to award primacy to the Body eternal. Because the Body eternal was the higher and better part, it “wipes away every imperfection” in the Body natural as long as the two are joined.⁵³ Generally, therefore, an act by the King derived from his Body eternal and was hence above reproach. With the death of the Body natural, moreover, the Body eternal does not die, but is transferred to the Body natural of the new King: “for as to this Body [Politic] the King never dies, [...] but that there is a Separation of the two Bodies, and that the Body politic is transferred and conveyed over from the Body natural now dead, or now removed from the Dignity royal, to another Body natural”.⁵⁴ Intertwined with the distinction between the Body natural and the Body eternal, moreover, was the distinction between the person of the King and “the Crown”. In contrast to the physical King, the “sempiternity of the invisible Crown” was a more abstract symbol for the interest of the English body politic as a whole. Although not completely the same, there was of course significant overlap between the ‘Body eternal’ and the “Crown”.

With “the King’s Two Bodies”, the Tudor jurists created an abstract sovereign within a personal sovereign, an important step towards a fully abstract sovereign. It is of

⁵⁰ Cf. EH Kantorowicz, *The King’s Two Bodies* cit. 316: “Interregna, whether long or short, had been a danger even in earlier times; they fitted badly into an age which had developed a relatively complicated machinery of state administration, as was the case in the later Middle Ages”.

⁵¹ Kantorowicz even speaks of a “crypto-theological” doctrine and the “Theology of Kingship”. *Ibid.* 16.

⁵² E Plowden, *Commentaries or reports* (London 1816) 2123 on the case of the Duchy of Lancaster, as referred to by Coke, Rep., vii, 10 (Calvin’s case) in *ibid.* 7.

⁵³ As decided in the case of William v Berkley, *ibid.* 238, and referred to by Coke, Reports, vii, 32, *ibid.* 11.

⁵⁴ *Ibid.* 233a, as quoted by Blackstone, Comm., 1,249, in *ibid.* 13.

course interesting in itself that English subjects were able and willing to go along in this abstraction and accept a “Body eternal” as the pinnacle and foundation of their formal hierarchy.⁵⁵ The enormous intellectual effort expended by the Tudor jurists to create this abstraction, however, also demonstrates just how vital it was to retain a clear formal hierarchy now that the personal sovereign had become too limited. Instead of abandoning sovereignty, they went to great lengths to reconcile sovereignty with the realities and needs of their society, ensuring that a formal hierarchy was retained.

Creating a dual sovereign, moreover, also created some useful conceptual space to restrain and limit the King’s “Body natural”. As the “Body eternal” was the higher part, the “Body natural” should not be allowed to act against the interests of the “Body eternal”, for example by ceding territory to another monarch.⁵⁶ In this way, abstract, or even semi-abstract sovereigns, enable constitutionalism and the rule of law.⁵⁷ In the longer run, moreover, the abstract notions of the Body eternal and the Crown also facilitated the *composite* sovereign of “the King in Parliament”. This further abstracts and removes sovereignty from physical persons but also allows internal sovereignty to be shared between persons and institutions.⁵⁸

Of course having one King with two bodies, or a multilevel King as EU lawyers might call it, creates a host of logical and legal problems as well. Can you still assassinate a Body eternal, for example? Or can Parliament rise up against the King’s Body natural to protect the King’s Body eternal?⁵⁹ And what happens when the Body natural has an illegitimate child which should not be attributed to the Body eternal? The case of a French bishop who claimed that he could be perfectly celibate with his spiritual body whilst fathering children with his physical body shows just one of the interesting possibilities that having multiple bodies opens up.⁶⁰

Abstract and compound sovereigns, therefore, have the habit of creating almost as many logical conundrums as they solve, and often require impressive legal and logical

⁵⁵ Obviously a parallel here lies with religion as well, which also includes the capacity to have faith in an increasingly abstract entity.

⁵⁶ EH Kantorowicz, *The King’s Two Bodies* cit. 347 and 358. Cf. also Bodin, who in fact went to great lengths to retain the many limitations on the powers of the monarch that existed in French legal practice, including the prohibition to change the basis, content, or scope of his own sovereignty, for instance by ceding territory. FH Hinsley, *Sovereignty* cit. 91, 105-7; JH Franklin, *Jean Bodin and the rise of absolutist theory* (Cambridge 1973) 79 ff. and JH Franklin, *Bodin: On Sovereignty* cit., xxv, Book I, ch. 8, 18 and Book I, ch. 10, 49.

⁵⁷ See on this process of “squaring the circle” by limiting the power of the sovereign by law also the struggles of the English jurists such as John of Salisbury with maxims such as: “that the Prince, although he be not bound by the ties of Law, is yet Law’s servant as well as that of Equity”. EH Kantorowicz, *The King’s Two Bodies* cit. 87-97. For a more elaborate discussion of this process of taming the sovereign see A Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples* cit. 299 ff.

⁵⁸ EH Kantorowicz, *The King’s Two Bodies* cit. 362 and 364.

⁵⁹ Cf. the claim of the Puritans: “We fight the king to defend the King”, in *ibid.* 18. Eventually this doctrine even allowed Parliament to execute only the Body natural of the King, without harming his Body eternal.

⁶⁰ *Ibid.* 43.

gymnastics. This is in no way intended to poke fun at the Tudor jurists.⁶¹ After all, an external observer could easily make fun of our contemporary theories of sovereignty as well. Take the claim that the EU does not undermine Member State sovereignty but only “pools” it, without really explaining what this pooling means, how something that is supposedly absolute can be pooled in the first place, or relies on a comparison with virginity to explain why this pooling does not lead to EU sovereignty.⁶² Or what to make of the German Constitutional Court, which manages, within a single judgment, to place sovereignty in the State, the constitution, the people, as well as in all three at the same time in the compound construct of the people – in the state – under the constitution, all in an ultimate attempt to protect national sovereignty and democracy whilst being part of the EU?⁶³

As with chimpanzees, however, starting with the Tudor doctrine on sovereignty allows us some more critical distance to observe the process of abstracting the sovereign and the clear gaps or even contradictions people are willing to accept to preserve some form of stable and ultimate authority. For since Tudor times, the process of abstraction has only picked up speed.

IV.2. WHERE ABSTRACTIONS RULE: ABSTRACT, ABSENT AND ABSOLUTE SOVEREIGNS

If we zoom out, we can see the Tudor doctrine of “the King’s Two Bodies” as a bridge between the earlier, predominantly physical sovereigns and the modern, increasingly abstract sovereigns.⁶⁴ This abstraction is enabled by the very nature of formal hierarchy and hence sovereignty. As we saw in chimpanzees, formal hierarchy inherently requires one to abstract from real power. The creation of an abstract sovereign takes this process of abstraction to its logical extreme.

⁶¹ Cf. also *ibid.* 3-5, describing how one might (wrongly) see the doctrine of “the King’s Two Bodies” as “that kind of man-made irreality – indeed that strange construction of a human mind which finally becomes slave to its own fictions – we are normally more ready to find in the religious sphere than in the allegedly sober and realistic realms of law, politics and constitution”.

⁶² See MacCormick’s famous comparison with virginity on this point: sovereignty can be lost without another gaining it. N MacCormick, *Questioning Sovereignty* cit. 126. See on the question if the EU *de facto* claimed sovereignty with direct effect and supremacy for example A Jakab, ‘Neutralizing the Sovereignty Question: Compromise Strategies in Constitutional Argumentations before European Integration and since’ (2006) *EuConst* 375; or G de Búrca, ‘Sovereignty and the Supremacy Doctrine of the European Court of Justice’ in N Walker (ed.), *Sovereignty in Transition* cit. 449.

⁶³ German Federal Constitutional Court 30 June 2009 2 BvE 123, 267 2 BvE 2/08 *Lissabon Urteil* para. 216, for instance, holds that “the basic law not only assumes sovereign statehood, but guarantees it”, whereas para. 334 declares the “the continuing sovereignty of the people”, and para. 340 talks about “[...] the sovereignty contained in the last instance in the German constitution”. Para. 231 unites them all: “in a functional sense, the source of Community authority, and of the European constitution that constitutes it, are the peoples of Europe with their democratic constitutions in their states”.

⁶⁴ Cf EH Kantorowicz, *The King’s Two Bodies* cit. 5 on the bridging function of the doctrine of “the King’s Two Bodies” between the personal reality of the early Middle Ages and the more abstract and impersonal conceptions found in modernity.

To realise just how far we have gone in abstracting our sovereigns, it suffices to enumerate some of the entities that have been declared sovereign over time.⁶⁵ A prime example is the spiritual entity of the “nation”, which has *inter alia* been declared sovereign in France and Belgium.⁶⁶ An alternative locates sovereignty in the abstraction of ‘the State’, as was the initial German approach of the late nineteenth century.⁶⁷ A further option has been to declare the constitution itself sovereign. Of course one can also go the initial Hungarian route and locate sovereignty in the “Holy Crown”, an object which is unlikely to develop a strong will of its own.⁶⁸ Currently, the most popular sovereign abstraction in the EU is of course “the People”.⁶⁹ Seventeen Member State constitutions explicitly acknowledge the sovereignty of the people, whereas the others have gradually incorporated significant elements of popular sovereignty in their constitutional set-up.⁷⁰ Even though the concept of popular sovereignty retains some link to the actual people, and the people can manifest themselves as such, these popular sovereigns remain abstract enti-

⁶⁵ See for a delightful discussion of the different methods use A Jakab, ‘Neutralizing the Sovereignty Question’ cit.

⁶⁶ Although the French nation used to be the sole sovereign, art. 3 of the French constitution of the Fifth Republic now blends the sovereignty of the nation with popular sovereignty by declaring that: “National sovereignty belongs to the people”. Today, in total six EU Member States place sovereignty in the Nation. In addition to France see art. 33 of the Belgian Federal Constitution, art. 1 of the Irish Constitution, which also refers to the “Most Holy Trinity, from Whom is all authority”, art. 2 of the Lithuanian Constitution, art. 32 of the Luxembourg Constitution, and art. 2(1) of the 1989 Polish Constitution and art. 4(1) of the 1997 Polish Constitution.

⁶⁷ This strategy can for example be observed in Germany, cf. M Stolleis, *Public Law in Germany 1800-1914* (Oxford University Press 2001) 343.

⁶⁸ A Jakab, ‘Neutralizing the Sovereignty Question’ cit. 382.

⁶⁹ See on the popularity of the People as sovereign more generally ES Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (Norton 1988) and B van Roermund, ‘Sovereignty: Unpopular and Popular’ in N Walker (ed.), *Sovereignty in Transition* cit. 33.

⁷⁰ See art. 1 of the Austrian Constitution, arts 1(2) and 1(3) of the Bulgarian Constitution (but also see arts 9 and 44(2)), art. 1 of the Croatian Constitution, art. 2 of the Czech Constitution, art. 1 of the Estonian Constitution, section 2(1) of the Finnish Constitution, art. 20(2) of the German Basic Law, art. 1(2) of the Greek Constitution, arts 2(2), 5 and 68(1) of the Hungarian Constitution, art. 1 of the Italian Constitution, art. 1(2) of the Latvian Constitution, arts 1 and 3 of the Portuguese Constitution, art. 2 of the Romanian Constitution, art. 2(1) of the Slovak Constitution (but also see arts 43(3) and 106), art. 3(2) of the Slovenian Constitution, art. 1(2) of the Spanish Constitution, and art. 1 of the Swedish Instrument of Government. Also note, moreover, that of the six Member States that have a sovereign “nation”, one could also argue that *de facto* these systems have evolved towards popular sovereignty or have at least incorporated an element of popular sovereignty. In addition to the explicit art. 3 of the French constitution, for example, De Witte notes for Belgium that, “[...] the sovereign ‘Nation’ in Belgium [...] would now, if the article had to be rewritten, be called the ‘people’”. See B. de Witte, ‘Do not Mention the Word: Sovereignty in Two Euro-philic Countries: Belgium and the Netherlands’ in N Walker (ed.), *Sovereignty in Transition* cit. 353. The UK, though no longer a Member State, of course formally retains sovereignty in “the Queen-in-Parliament”, whereas section 12 of the Danish Constitution places “supreme authority” in the King, who is nevertheless bound by the Constitution.

ties. “The people”, after all, are distinct from for example the voters or the current inhabitants, and therefore usually unable to wield their sovereign power directly.⁷¹

Because abstractions cannot wield their power directly, abstract sovereigns also become more absent. The Tudor King still was a visible, acting reality. Similarly, the sovereign of Bodin, even if limited, was envisioned as a central actor on the daily political stage, wielding multiple important powers. Today, however, sovereigns are part of the underlying conceptual fabric of our polities, but rarely come out to play. This is not just because their abstract nature makes it impossible for them to physically act. It is also because their functions and powers have become more abstract as well. This is taken to the logical extreme by the sovereign of Carl Schmitt, who exists and acts solely in the case of “the exception”. In normal times, this sovereign remains hidden behind the organs of the State, which wield all authority as delegates of the sovereign.⁷²

With sovereignty safely tucked away in abstract and absent abstractions, furthermore, sovereigns could also be allowed to become rather absolute in nature. If one looks closely at the early sovereigns of the Tudors or Bodin, for example, these were far less absolute than the standard quotations of their work suggest.⁷³ As abstract sovereigns could only work through their constitutionally limited agents, however, these sovereigns themselves could be more easily and safely conceptualised as absolute and limitless.⁷⁴ Such absoluteness, in turn, might have helped conceptions of sovereignty to fulfil their evolutionary function. With absolute power, as the ultimate alpha, the sovereign will theoretically be able to solve any dispute that may arise, and that cannot be solved with the ordinary social processes. Importantly, though, under our evolutionary approach, such absoluteness is *not a necessary requirement* for sovereignty, or at least a sufficient formal hierarchy, to function. As we saw, in chimpanzee colonies the alpha was far from absolute. He only needed *sufficient* authority to fulfil his stabilisation function, *i.e.* be able to act as the final authority where the group requires this. In light of this evolutionary function, it would therefore seem the sovereign only needs *sufficient* authority to solve stability threatening disputes, but does not need absolute or limitless

⁷¹ See for example the capacity of the German people to replace their constitution altogether, sidestepping the eternity clause, as recognised by the German Constitutional Court in BVerfGE 2009 2 BvE 123,267 2 BvE 2/08 *Lissabon Urteil*.

⁷² Cf. famously C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (translated by G Schwab) (University of Chicago Press 2005) 5.

⁷³ See for example Bodin’s famous definition of sovereignty as “la puissance perpétuelle et absolue d’une république”, which is often taken wrongly on face value and hence contributed to the myth of sovereignty having to be absolute. JH Franklin, *Bodin: On Sovereignty* cit. Book I. ch. 8 and A Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples* cit. ch. 9.3.

⁷⁴ This of course does not apply to constitutional actors that claim to act in the name of the sovereign, as these are simply bound by the limits of their own constitutional powers, a distinction some populists clearly have difficulties in making.

authority. If we combine these elements, there may be sufficient conceptual space for EU lawyers to reconcile sovereignty with integration.

IV.3. WHY THE EU SHOULD NOT THREATEN BUT SUPPORT A STABLE FORMAL HIERARCHY

The fact that humans have learned to accept highly abstract and absent sovereigns does not remove the fundamental emotional need for a clear and stable formal hierarchy. Evolution cannot keep up with globalisation. It is even submitted that the willingness of people to buy into blurry and often internally inconsistent national sovereignty constructs only demonstrates just how badly people need the stable formal hierarchy created by an ultimate and absolute authority. The abstract nature and dormant existence of most national sovereigns in the EU should therefore not be mistaken for the irrelevance of formal hierarchy or sovereignty in our interdependent world. It only demonstrates how successful many of the national abstraction strategies have been, and how flexible the need for formal hierarchy can be met by an array of sovereignty conceptions.⁷⁵

It is further submitted that European integration has challenged the existing formal hierarchy in Member States, including national sovereignty constructs. To begin with, the EU claims supremacy over national law, including constitutions.⁷⁶ This challenges the claim to ultimate authority of national sovereigns. At the same time, the EU does not claim sovereignty, or full and ultimate authority, for itself. The EU therefore challenges the national alphas, but cannot and does not want to become the new alpha itself. What is more, even the claim to legal supremacy is essentially rejected, or at least limited, in almost all Member States, both judicially and politically. Despite respecting supremacy for most practical purposes, almost all constitutional courts hold that ultimate authority still rests with the national constitution, and that hence EU primacy is limited by these constitutions.⁷⁷ What is more, even to the extent that the EU claims a

⁷⁵ Member States have of course spent significant time and energy in developing their own sovereignty constructs, and logically sovereignty remains politically more relevant and sensitive in those Member States, such as Poland and Hungary, which have only relatively recently regained their own sovereignty. See especially A Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (Cambridge University Press 2005), and A Albi, 'Postmodern Versus Retrospective Sovereignty: Two Different Discourses in the EU and the Candidate Countries?' in N Walker (ed.), *Sovereignty in Transition* cit. 401. This can also be seen in how their national constitutional courts defend national sovereignty. See Polish Constitutional Court 11 May 2005 K18/04 *Accession to the EU*, or Polish Constitutional Court 24 November 2010 K32/09 *Lisbon Treaty*, as well as the Czech Constitutional Court in its 31 January 2012 ÚS 5/12 *Landtova Pl*.

⁷⁶ For one of many confirmations, see case C-399/11 *Melloni v Ministero Fiscal* ECLI:EU:C:2013:107 para. 59.

⁷⁷ See especially the by now famous three cases in which national high courts openly reject the primacy of EU law, Czech Constitutional Court judgment of 31 January 2012 ÚS 5/12 *Landtova Pl*; Danish Constitutional Court 6 December 2016 case 15/2014 *Ajos* and notoriously the German Constitutional Court judgment of 5 May 2020 in 2 BvR 859/15 *Weiss*. After the manuscript was closed, but before the

clear formal hierarchy through supremacy, this claim may be too much out of sync with real power. Member States still control, by far, the most sources of real power, including money, administrative capacity, and the means to enforce. Where Member States refuse to follow the law, for example in Poland or Hungary, or during the refugee crisis and Covid pandemic, the effectiveness of EU authority is dangerously challenged. Populist leaders across the EU seem to sense this, as they openly challenge EU authority to boost their own hierarchical position.

Describing this reality as pluralist, and stressing that most actors make it work in practise, does not change the fact that, in the EU, the locus of ultimate authority remains contested. Consequently, European integration has disrupted the existing formal hierarchy in the Member States, up to and including national sovereignty arrangements. What is more, populist leaders may be trying to utilise the gap between the EU's formal authority claim and its real power, especially in sensitive areas like migration and foreign policy. As in Arnhem zoo, this disruption leads to stress in the population and rekindles the primal need for a clear formal hierarchy. From this perspective, it is only logical that voters are increasingly demanding answers to some basic questions. Who is the boss? What will happen in case of a conflict? Is my national group still safe and stable?

In line with the evolutionary conception of sovereignty suggested here, the response to these questions should not be to reject the need for a stable formal hierarchy, often formulated in demands to protect national sovereignty. Instead, the aim should be to fulfil this need in a way that fits with our interdependent and integrating reality. The process of abstraction outlined in this section offers vital conceptual space for this exercise. People have long ago accepted that their sovereign does not have to be an absolute, omnipotent person. Sovereigns can be abstract and absent, and under their aegis authority can be cut-up, shared or delegated to a remarkable extent, as long as the ultimate formal hierarchy remains clear and stable.

From this perspective, the challenge becomes to use the flexibility offered by abstraction to create a conception of sovereignty which sufficiently meets the evolutionary need for formal hierarchy but also allows for effective European integration. Doing so is of course a Herculean task which exceeds any individual's capacity, yet the last section will explore some possible starting points for meeting this challenge in EU law.

V. SUPPORTING FORMAL HIERARCHY AND EMBRACING NATIONAL SOVEREIGNS THROUGH EU LAW

Traditionally, national sovereignty has been seen as an obstacle to EU integration. This already becomes evident from seminal case law such as *Van Gend en Loos* and *Costa v*

print proofs, the Polish Constitutional Tribunal gave the most far reaching and violent rejection of EU supremacy to date. See the Polish Constitutional Tribunal judgment of 7 October 2021 in case K 3/21.

E.N.E.L., which holds that Member States have limited their own sovereignty to enable the creation of an autonomous legal order with direct effect and supremacy over national (constitutional) law.⁷⁸ Sovereignty and integration then become an either/or. Only if the EU trumps national sovereigns can the EU legal order be safe and effective.

From this perspective, only two options remain, assuming one wants to safeguard integration. Either the EU becomes the ultimate formal authority, the new sovereign so to speak, or the EU does away with the need for sovereignty altogether. Neither of these options seems realistic or desirable. Perhaps early integration theories, such as neo-functionalism, still expected that there could be a smooth and gradual transition to a federate EU in which sovereignty resided at the central level.⁷⁹ Such an outcome, however, seems rather far removed from the post-Brexit reality of today. For the foreseeable future, Member States clearly remain the primary locus of political legitimacy and loyalty.⁸⁰ The option of scrapping sovereignty altogether ignores the vital evolutionary function of formal hierarchy as set out above, and is a non-starter.

Instead of challenging national sovereignty, and seeing it as inherently antithetical to European integration, the EU should therefore embrace national sovereignty and strive to reinforce and reassure the national sovereignty abstractions in place. As indicated, it goes far beyond the ambition and capacity of this contribution to outline how this should be done in any detail. The only objective here is to argue that embracing sovereignty is the best direction of travel, and to provide some footholds in EU law for this purpose. Three general strategies for supporting national sovereigns can thereby be discerned.

First, and most generally, the EU could explicitly acknowledge ultimate national sovereignty and entrench the protection of national sovereignty as one of its values or objectives. As part of this general acknowledgment, the EU could clarify its still unclear *finalité*. Even if no positive agreement is needed on what the EU precisely is or should become, a *negative consensus* on what the EU should not become should be possible. Expressly excluding any *finalité* which would negate national sovereignty, for example by excluding the baseless but real fear for a European super state, could act as a reassurance in this regard. Ideally, the aim of protecting and safeguarding national sovereignty could be legally entrenched in the Treaties, for example as an EU value or an objective in art. 2 or 3 TEU. Fully acknowledging the impressive obstacles to any Treaty

⁷⁸ Case C-26/62 *Van Gend en Loos* ECLI:EU:C:1963:1; case C-6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66.

⁷⁹ E Haas, *Beyond the Nation State: Functionalism and International Organization* (Stanford University Press 1964) and A Niemann and PC Schmitter, 'Neofunctionalism' in A Wiener and T Diez (eds), *European Integration Theory* (Oxford University Press 2009) 45.

⁸⁰ The increasingly discussed notion of "European sovereignty" as championed by *inter alia* Macron, seemingly does not want to challenge national sovereignty but rather supports and enriches it. Consequently, it fits better with the conception of sovereignty set out below. See for example the 2018 "State of the Union" address by the Commission President Juncker entitled "the Hour of European Sovereignty", available at: ec.europa.eu.

change in the near future, such an inclusion would offer acknowledgment and at least some level of protection at the level of primary law. Alternatively, respect for national sovereignty could be read into arts 2 and 3 TEU by the European Court of Justice, for example as part of the values of freedom, democracy, and the rule of law, which could be said to include or presume national sovereignty. Of course the explicit recognition of national sovereignty could also be laid down in more political documents and declarations as well. Even if such explicit recognitions of national sovereignty may have no or only a very limited impact on the actual competences of the EU or the application of EU law, their symbolic weight should not be underestimated. After all, the “greetings” with which chimpanzees acknowledge formal authority are highly symbolic as well.

Secondly, safe havens for particular elements of national sovereignty could be carved out in EU law.⁸¹ This could either be done procedurally, by allowing national law to determine certain aspects of national sovereignty, or more substantively, by recognising certain core aspects of sovereignty in EU law itself. Obviously the position under EU law has so far been that there “simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community”.⁸² Even in those areas where the EU has no competence, therefore, Member States must respect EU law when they act within the scope of EU law.⁸³ The European Court of Justice has so far also been careful to limit the concept of national constitutional identity, so as to not allow it to develop into an open-ended sovereignty exception.⁸⁴ Any such escape clause based on national law, and therefore under the control of the national judiciary, could after all be abused and undermine the effectiveness and autonomy of EU law.⁸⁵ The current rule of law crisis in Poland and Hungary provides a clear warning in this regard.

Perhaps, however, we should reconsider this traditional position. We could explore if and how the effectiveness of the EU and its legal order might be sufficiently protected whilst still providing Member States with some form of sovereign safe haven. A legal

⁸¹ Conceptually this could only be a recognition in EU law that certain sovereign rights are not affected by EU law, as sovereignty cannot be bestowed by EU law, except where one would choose a more Kelsenian approach where national sovereignty derives from international law. See H Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen 1920).

⁸² K Lenaerts, ‘Constitutionalism and the many faces of Federalism’ (1990) *AmJCompl* 220.

⁸³ See for example case C-72/83 *Campus Oil* ECLI:EU:C:1984:256; case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:608. See on the impact of the internal market on sovereignty in this regard also A Cuyvers, ‘Balancing Sovereignty, Trade and Northern-Irish Peace. Free Movement of Goods post-Brexit’ in F Kainer and R Repasi (eds), *Trade relations after Brexit* (Hart 2019) ch. 5.

⁸⁴ See *inter alia* *Sayn-Wittgenstein* cit. paras 92 to 94 and case C-391/09 *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291 paras 86 and 87, and case C-438/14 *Bogendorff von Wolffersdorff* ECLI:EU:C:2016:401. For a creative attempt the other way around, see A Von Bogdandy, M Kottmann, C Antpöhler, J Dickschen, S Hentrei, and M Smrkolj, ‘Reverse Solange—Protecting the essence of fundamental rights against EU Member States’ (2012) *CMLRev* 489.

⁸⁵ To illustrate just how jealously the Court of Justice guards autonomy, partially for this reason, see especially case C-284/16 *Achmea* ECLI:EU:C:2018:158.

starting point for such legal safe havens could be found in art. 50 TEU and the *Wightman* judgment.⁸⁶ Art. 50 TEU recognises the right of each Member State to leave the EU, eventually even unilaterally.⁸⁷ The Court of Justice held that withdrawal is an independent sovereign right of each Member State. For that reason, EU law cannot limit a Member State from withdrawing its notice of withdrawal, as long as this withdrawal meets some minimum formal requirements.⁸⁸

Clearly the right to leave the EU is only a minimal recognition of sovereignty and by itself probably not enough to safeguard sufficient formal hierarchy. After all, leaving is an extreme step, which for multiple political and economic reasons may not be a viable option.⁸⁹ Just as the option of suicide does not equal freedom, the option of committing economic seppuku by leaving the EU may not feel as real sovereignty. Agreeing on additional sovereign safe havens, moreover, will be hard, as each may be abused and as different Member States may want different rights protected, which could undermine the uniformity and reciprocity of EU law.⁹⁰ What is more, any claim of a more substantive sovereign core which is impermeable to EU law will lead to the eternal federal debate as to how this core should be delineated, who gets to have the last word on the limits of this core, and who can therefore prevent potential abuse.⁹¹

At the same time, *Wightman* for the first time explicitly recognises that there can be an absolute national sovereign right under EU law. It thereby invites us to explore if others might exist or be created as well, even though we must acknowledge the risks and obstacles this entails. In exploring additional safe havens, the case law on constitutional identity may offer additional inspiration, as does other case law where the CJEU already shows some level deference to national law, such as with national procedural autonomy or sensitive areas of the internal market.⁹² In addition, inspiration could be drawn from the growing corpus of *national* case law struggling to protect some form of

⁸⁶ Case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999, discussed further in A Cuyvers, 'Wightman, Brexit, and the Sovereign Right to Remain' (2019) CMLRev 1303.

⁸⁷ See for example C Hillion, 'Withdrawal under Article 50 TEU: An integration-friendly process' (2018) CMLRev 32.

⁸⁸ *Wightman and Others* cit. for example para. 56: "[...] Article 50 TEU pursues two objectives, namely, first, enshrining the sovereign right of a Member State to withdraw from the European Union and, secondly, establishing a procedure to enable such a withdrawal to take place in an orderly fashion".

⁸⁹ Cf. also A Cuyvers, 'Balancing Sovereignty, Trade and Northern-Irish Peace' cit.

⁹⁰ See also Cuyvers, 'Wightman, Brexit, and the Sovereign Right to Remain' cit.

⁹¹ See for example DJ Elazar, *Exploring Federalism* (University of Alabama Press 2006) ch. 3.

⁹² See for example case C-453/00 *Kühne & Heitz* ECLI:EU:C:2004:17 protecting *res judicata* at the expense of supremacy; case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* ECLI:EU:C:2009:519, giving tremendous leeway when regulating games of chance due to diverging moral views, or case C-159/90 *Society for the Protection of Unborn Children Ireland v Grogan and Others* ECLI:EU:C:1991:378 dodging the applicability of EU law in the context of abortion.

core sovereignty whilst respecting EU law.⁹³ Since common constitutional principles form a possible source for general principles of EU law, the CJEU could take this body of national constitutional law into account, for example to try and divine some common trends as to sovereign safe havens. Even the mere willingness of the CJEU to do so could contribute to a more constructive dialogue between high courts in the EU, akin to the discovery of fundamental rights within the EU legal order after the *Solange* saga, and offer a constructive way forward after the *Weiss* debacle.

It should be kept in mind, moreover, that the aim of creating sovereign safe havens under EU law is not to find any theoretically perfect delineation between EU law and national sovereignty, which probably does not exist. Instead, the aim is to recognise and reassure national sovereigns to a sufficient extent so as to enable them to fulfil their evolutionary purpose of providing sufficient certainty and stability. As existing national sovereignty doctrines show, theoretical perfection is far from required for that purpose. Usually, a genuine attempt suffices, which might also be why federal systems keep having this discussion even though they know no perfect or eternal answers exist.⁹⁴ When searching for this balance, moreover, we may also consider to either reduce EU influence in areas where it lacks sufficient real power, or to alternatively expand the EU's real power in areas where its authority is being challenged, for example by increasing the EU's fiscal capacity. Which way to go of course involves major normative choices and will require important national debates. Yet both will reduce the gap between the EU's formal authority and actual power. In turn, this could reduce the attraction and possibilities for national politicians to challenge the EU based on this gap.

Third, and lastly, the EU could actively support and facilitate Member States in their struggle to modify their existing *national* sovereignty abstractions in a way that better fits with EU integration and our global reality. Most national conceptions of sovereignty have been constructed with the traditional Westphalian model in mind, where power and authority were concentrated in the state. These conceptions need to be adapted to life in the EU and our globalising reality.⁹⁵ As discussed in section IV, the highly abstract conceptions of sovereignty provide crucial conceptual space for this exercise. Why, for example, can national sovereigns not delegate significant parts of their sovereign powers to the EU, instead of solely doing so internally? Or why can we not have compound or composite conceptions of national sovereignty, where some lesser part of sovereignty, the "Body EU" so to speak, resides in Brussels but the higher "Body national" remains in the capital?

⁹³ Here of course the case law of the German Constitutional Court has become notorious, see especially BVerfGE *Lissabon Urteil* cit., BVerfGE *Honeywell* cit., BVerfGE 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 (2016) *OMT*, and *Weiss* cit.

⁹⁴ DJ Elazar, *Exploring Federalism* cit. ch. 2.

⁹⁵ Of course, this is not to deny that much has already happened at the national level. See for an impressive recent overview A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (Asser Press 2019).

Clearly, each Member State will have to find its own solution which fits its national constitutional and historical context. Yet the EU could support this process, for instance by sharing best practices or creating the required legal space under EU law as set out above. Here again, therefore, a collaboration could be sought with national high courts. From the perspective of this contribution, after all, national courts and the CJEU are *de facto* facing the same challenge: how to reconceptualise sovereignty in a way that protects Member States but enables EU integration, which itself may be necessary to maintain the state in the long run. Seen in this way, the attempts by many national high courts, led by the German Constitutional Court, to construct some form of firebreak against EU integration around national sovereignty should not be seen as an attack against EU integration but as contributions to a shared challenge. What is more, national high courts seem intent on carving out sovereign safe havens anyway, even if several of these havens remain highly theoretical for now. Instead of engaging in a fruitless frontal confrontation with these national high courts, which often enjoy deep legitimacy and national support, it would seem wise, and more in line with the spirit of European integration, to engage in a constructive collaboration, which would also require compromise at the EU level.

For all these three tentative strategies to reconcile sovereignty with EU integration, moreover, it should be kept in mind that the ultimate aim is only to ensure that national sovereignty remains *strong enough* to fulfil its evolutionary function: providing the sufficiently stable and clear hierarchy that we human beings need at an emotional level. For only by sufficiently safeguarding national sovereignty can the EU help create the emotional safety required to support ongoing and increasingly far reaching European integration. Obviously further (empirical) research would be required to establish just which sovereign abstractions could best contribute to providing this sense of safety and security, and as indicated this contribution can only offer some exploratory suggestions and tentative conclusions. Yet if we can understand Brexit and the populist surge in part as a visceral cry for a stable formal hierarchy through national sovereignty, ignoring this cry only does the EU a disservice. For even if Brexit was supported by an admittedly impressive amount of silliness and nonsense, underlying it is a very real emotional fear which must be addressed. For in evolution, as in politics, emotions are very much facts, and ignoring emotions in the name of rationality is done at one's own peril.

The argument, therefore is empathically not that Brexit-supporters or sovereignty touting nationalists are like chimpanzees, whereas enlightened minds in favour of European integration are not. Quite the contrary: the argument is that we are all closer to apes than we may want to admit, and that we would do well to remember it when re-shuffling the governance of a continent.