



## INSIGHTS

### QUESTIONING EUROPEAN (UNION) SOVEREIGNTY

edited by Ségolène Barbou des Places

## THE TWO FACES OF EUROPEAN SOVEREIGNTY

ANTOINE BAILLEUX\*

ABSTRACT: "European sovereignty" seems at first sight to be a misnomer. The EU is not sovereign in the classical sense of the word. By contrast, it can be argued that the EU transforms national sovereignty, both in its internal and external dimension. This "Europeanisation" of Member State's sovereignty could be seen as an attempt to restore and expand the "rule of law" not only by harnessing market forces but by using them in order to promote "home-grown" legal standards. In that sense, "European sovereignty" may be a legal *contradictio in terminis* but it may also be the only future of sovereignty *tout court*.

KEYWORDS: sovereignty – civilization – Brussels Effect – rule of law – globalisation – EU.

### I. NO EUROPEAN SOVEREIGNTY...

Constitutional lawyers usually associate sovereignty with the State and consider it as a bi-faceted concept.<sup>1</sup> The *internal* dimension of sovereignty refers to the State's supreme normative power within its borders. The State does not only enjoy the "monopoly of legitimate violence" but it is also the ultimate source of any legal norm applicable on its territory. This is not to say that every law originates from the State but that no law can be enforced without the State's (whether explicit or tacit) approval. By contrast, the *external* dimension of sovereignty characterizes the State's independence *vis-à-vis* foreign entities, and most notably other States. It is the cornerstone of the Westphalian international legal order and underpins core principles of *jus gentium* such as the prohibition of the use of force and the non-interference in domestic affairs.

With this definition in mind, talking about "European sovereignty" seems at first glance quite a stretch.

\* Professor of Law, Université Saint-Louis (Bruxelles), antoine.bailleux@usaintlouis.be.

<sup>1</sup> On this issue, see A. BAILLEUX, H. DUMONT, *Le pacte constitutionnel européen*, Brussels: Bruylant, 2015, pp. 145-156.



Turning first to the internal side of sovereignty, it is common ground that the European Union does not enjoy the kind of supremacy that characterizes States. In spite of all the “new legal order” rhetoric developed by the Court of Justice, the European Union remains an international organization based on international treaties and therefore, ultimately, on national constitutions. Its “ever closer union” brings together “the peoples [plural] of Europe” and it has no say on either the conditions or the procedure to become a European citizen. Its members can freely decide to secede, as Brexit has just confirmed. Finally, its Court cannot annul national laws and only those EU rules which have direct effect must lead a domestic judge to set aside conflicting internal norms.<sup>2</sup>

The same holds true for the external dimension of sovereignty. The European Union neither has a territory of its own nor an army to defend it. It experiences difficulties speaking with one voice in international fora because of the unanimity requirement which governs its common foreign and security policy. And the EU-Canada Economic and Trade Agreement (CETA) saga shows us that even its power to close trade deals can be hampered by the veto of a small regional entity.

In the face of such compelling evidence, the expression “European sovereignty” turns out to be little more than a fancy catchword coined by federalists in order to keep their dream alive. It is based on a distortion of a concept that is central to both constitutional and international law. It must therefore be handled with extreme caution, if only because it has the potential of misleading the layman and fueling the “fake news” reservoir of Euroskeptic parties.

These misgivings should not, however, detract from a critical reflection on the way Europe *transforms* sovereignty, in both its internal and external dimensions.

## II. ... BUT A “EUROPEANISED” (CONCEPT OF) SOVEREIGNTY

As regards its inner facet, it can be argued that the EU has *tamed* national sovereignty. As is well known, in most fields of EU competence the Member States have given up the unilateral exercise of their – increasingly illusory – normative supremacy in exchange for the collective use of a shared – but more effective – sovereignty. The majority voting system that epitomizes such a shift entailed tremendous sacrifices for the Member States, including accepting that norms they reject could apply on their territory and that rules they support could not.

Even more fundamentally perhaps, this deal also resulted in placing national governments and legislatures under the supervision of supranational bodies such as the Commission and the Court of Justice. From the outset, these two institutions have used the free movement principles to prevent Member States from using their normative

<sup>2</sup> This point was only recently clarified by the Court of Justice. See Court of Justice, judgment of 24 June 2019, case C-573/17, *Poplawski*.

power in a way that would discriminate citizens or economic actors from other European countries. As the European Union developed, the civilizing mechanic of EU law progressively extended to the protection of fundamental rights. This trend famously culminated in the Court of Justice's red flags as regards Polish rules reshuffling the organization of justice, with the EU judiciary coming to the rescue of Polish citizens threatened by their government's attacks on the rule of law.<sup>3</sup> Even the Member States' sovereign rights over their natural resources are not left unscathed by this Europeanisation process, as another case against Poland illustrates.<sup>4</sup>

In that sense, the European integration process can be characterized as a formidable civilizing process of national sovereignty,<sup>5</sup> affording protection (of the foreign trader, of the European worker, of the national citizen, and even of the domestic wildlife) against the abusive exercise of sovereign rights by governments. In that respect, it can be argued that the European Union has – thus far – lived up to its historical mission, namely to prevent Nation States from cyclically relapsing into the *hubris* that sparked off two world wars and nurtured centuries of violence.

The Europeanisation process has also significantly – and arguably even more deeply – transformed the external dimension of sovereignty. It is no coincidence that the only six documents containing the expression “European sovereignty” in the EUR-Lex database all relate to the independence of the EU *vis-à-vis* foreign entities – whether States or multinationals.<sup>6</sup> Used in this political and informal sense, this concept refers to the ability of the European Union to provide Member States with the kind of autonomy that none of them can any longer achieve separately on the global scale.

<sup>3</sup> Court of Justice, judgment of 24 June 2019, case C-619/18, *European Commission v. Poland (Indépendance de la Cour suprême)*; Court of Justice, judgment of 5 November 2019, case C-192/18, *European Commission v. Poland (Indépendance des juridictions de droit commun)*.

<sup>4</sup> Court of Justice, judgment of 17 April 2018, case C-441/17, *European Commission v. Poland (Forêt de Białowieża)*.

<sup>5</sup> In a similar vein, see J.H.H. WEILER, *To Be a European Citizen – Eros and Civilization*, in *Journal of European Public Policy*, 1997, p. 495 *et seq.*

<sup>6</sup> These six documents are: 1) Opinion of the European Committee of the Regions — A new European agenda to speed up the development of maritime industries, COR 2018/06141; 2) Communication COM(2019) 218 final of 30 from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Europe in May 2019: Preparing for a more united, stronger and more democratic Union in an increasingly uncertain world – The European Commission's contribution to the informal EU27 leaders' meeting in Sibiu (Romania) on 9 May 2019; 3) Opinion of the European Economic and Social Committee on the “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the mid-term review on the implementation of the digital single market strategy – A connected digital single market for all” [COM(2017) 228 final]; 4) Opinion of the European Committee of the Regions on “A new stage in the European policy on blue growth”; 5) Commission Recommendation (EU) 2019/534 of 26 March 2019 Cybersecurity of 5G networks; 6) Written questions by Members of the European Parliament and their answers given by a European Union institution (2014/C 300/01).

But it would be a mistake to reduce this external side of “European sovereignty” to a shield designed to mitigate – or simply delay – Europe’s progressive loss of influence in a globalized world. As U.S. scholar Anu Bradford aptly demonstrates in her recent book on *The Brussels effect*,<sup>7</sup> the European Union currently sets the regulatory tone at the global level on a variety of topics ranging from competition law to data, environment and consumer protection. The combination of a large and wealthy market, unsurpassed regulatory expertise and a high sensitivity to the protection of non-market values have turned the European Union into a *de facto* worldwide rule-maker with unmatched influence – even by the United States – on third country legislatures and large corporations.

To conclude, it should be noted that law and the market are the main driving forces behind this transformation of national sovereignty within the European Union, both in its internal and external dimensions. It is the protection of common rules (and primarily of common market rules) that justifies the EU’s interference in a Member State’s political choices. And it is the adoption of shared standards combined with a strong market power that preserves the autonomy and buttresses the leadership of European countries at the global level.

This process can be understood as a (partial and imperfect) response to the erosion of national sovereignty that affects all States across the world. Whereas globalization has given economic actors (mainly transnational corporations) leverage to strongarm national lawmakers and bypass democratic deliberation, the Europeanisation of Member States’ sovereignty could be seen as an attempt to restore and expand the “rule of law” not only by harnessing market forces but by using them in order to promote “home-grown” legal standards. In that sense, European sovereignty may be a legal *contradictio in terminis* but it may also be the only future of sovereignty *tout court*.

<sup>7</sup> A. BRADFORD, *The Brussels Effect – How the European Union Rules the World*, Oxford: OUP, 2020.