

Readers may redistribute this article to other individuals for noncommercial use, provided that the text and this note remain intact. This article may not be reprinted or redistributed for commercial use without prior written permission from the author. If you have any questions about permissions, please contact Klaus Nellen at IWM, Spittelauer Laende 3, A - 1090 Vienna, Fax +(431) 31358-30, e-mail <nellen@iwm.at>.

Preferred Citation: Tokár, Adrián. *Something Happened. Sovereignty and European Integration*. In: *Extraordinary Times*, IWM Junior Visiting Fellows Conferences, Vol. 11: Vienna 2001



Something Happened. Sovereignty and European Integration

Adrián Tokár

Introduction

The purpose of this study is to show, as its title suggests, that something happened to the notion of sovereignty in Europe after the creation and development of what is now the European Community and European Union. There is some important development under way that does not allow us to look at sovereignty of EU member states the same way we would do if there were no integration. This includes mainly the abolition of internal frontiers, the creation of a supranational legal system and the introduction of the concept of a European citizenship.

These are facts; even those who believe that integration has no effect on sovereignty do not deny them. Some of them claim that the EU has no apparatus of its own to enforce its measures, others that the member states accepted this state of affairs voluntarily and thus it *per definitionem* cannot be limiting their sovereignty, as member states are just exercising their sovereignty in a different way. I will argue that the first claim is irrelevant if one is to answer from a legal theoretical point of view that the sovereignty of the member states is transformed. On the second point, my conclusion is that accepting this argument would lead to such a narrow and formalistic understanding of sovereignty that cannot be upheld even from a legal positivistic perspective.

General trends in the development of sovereignty in the 20th century

Before analyzing the transformation of sovereignty in the EU, a closer look should be taken at the wider context of this transformation. European integration is happening in the environment of a radical, worldwide transformation and re-evaluation of the notion of sovereignty.

The 20th century was the century of spreading sovereignty geographically in an unprecedented manner and at the same time a period of the relativization of its meaning. Today, the surface of the world is almost completely covered by sovereign states, which is a major step compared to the situation at the beginning of the 20th century, when colonization was accepted and sovereignty was the privilege of the “civilized”. The de-colonization movement changed this pattern considerably. Over a hundred new states were born between 1945 and 1989, and another 20 or so after the collapse of the Soviet Union. The idea of self-determination has been haunting the world since 1918, the famous fourteen points of President Wilson, and the idea that a nation has to live in its own state has led to very different outcomes, such as peaceful or violent independence movements, or even ethnic cleansing. “To have one’s own state is to have life” – claims the title of a book celebrating the newly born sovereignty of the independent Slovak republic; as exaggerated as it may seem, this title sums up a mind-set, according to which sovereignty is not an abstract idea, something for the elites, but a basic need of everybody; it is a basic right of every nation to rule the territory it inhabits.

Sovereignty as independence of a state and its recognition by the international community is an important part of the traditional definition of the concept. It is usually called “external sovereignty” or “international legal sovereignty” and means that a state is acting as a recognized entity on the international scene, without being submitted to any foreign power.

Universal as it may be geographically, external sovereignty is not absolute. It is increasingly relativized by trends usually called “globalization”. Globalization means rising levels of economical and cultural interdependence, motored by technological development and economic growth. But there are legal barriers to the exercise of external sovereignty, too. Since 1928, when the Briand-Kellogg pact was signed, states are no more allowed to wage wars. On the other hand, weapons of mass destruction would probably make waging nuclear war a suicidal option – a good example of the case when normative and factual boundaries or the exercise of sovereignty overlap.

In the above sense, sovereignty can be relatively easily measured. A state is sovereign if it is acting independently on the international scene and recognized by oth-

ers states (not necessarily all other states). There is another, just as traditional meaning to the term, and that is “internal” sovereignty. Internal sovereignty means the existence of a single, stable and supreme state power structure inside the boundaries of a state, unchallenged by other actors. The extent and limits of internal sovereignty are far less clear than those of external sovereignty. The German Democratic Republic of the 1980’s directing virtually the entire economy, massively endorsing an almost religion-like state ideology, controlling the private life of its citizens by a huge secret police force was just as sovereign a state as any liberal democracy of the West. What can be said almost with certainty is that probably no state has ever exercised complete rule over its territory; but, to be sovereign, a state must be able to secure a public order on its territory, respected by the overwhelming majority of the population.

The same trend of relativization can be noticed in the case of internal sovereignty. Legal arrangements limiting sovereign states in the exercise of their sovereignty are numerous. The end of World War I saw the introduction of the protection of minorities and the birth of the League of Nations. In 1945, the United Nations was created, and the Universal Declaration of Human Rights was signed in 1948. In 1976 the two conventions on human rights, the Convention on Political and Civil Rights and the Convention on Social, Economic and Cultural Rights took effect. The General Agreement on Tariffs and Trade was created in 1949 and has been regulating tariff rates ever since. The International Monetary Fund and the World Bank, both established in 1945 have lent money to sovereign states and have been imposing structural conditions on them, requiring more than simple repayment of the loan.

As it appears, relativity is one of the inevitable features of every definition of sovereignty. There is no absolutely sovereign state, free from factual pressures or normative constraints. On the other hand, sovereignty is not only a form either; to be sovereign, a state must have supreme authority in some areas, almost certainly including defense, foreign policy, police and justice. But it cannot be determined what degree of state control over other fields, such as the economy is requested to treat a state as sovereign. States with state-controlled and liberal economies have both been deemed to be sovereign.

Looking at the history of the concept of sovereignty teaches us another lesson. Sovereignty can be understood in a legal and a factual sense. Sovereignty in a legal

sense, or *de iure* sovereignty is sovereignty as defined by law¹. Factual, or *de facto* sovereignty indicates the actual power a state has in pursuing its goals. To invoke the example of nuclear weapons again: every state has the right to pursue its foreign policy, laid down in international law and many state constitutions; however, a big state that possesses a strong military and a small state have very different actual possibilities to pursue their interests. The US and Andorra are legally equally sovereign states, but the weight of the two actors on the international scene is different. As sovereignty is not defined legally, it is legitimate to use the term sovereignty for both concepts. In this paper, however, I will use the term sovereignty for *de iure* sovereignty; I will refer to *de facto* sovereignty as autonomy instead of sovereignty².

Power vs. Force

One of the special features of the way European integration transforms the sovereignty of its member states is the lack of means of physical enforcement on a European level. The contrast is striking if we compare the historical background of the emergence of the nation-state and that of the European Union.

¹ This definition may be misleading; in fact, there is no positive legal definition of sovereignty, i.e. no legal norm tells us, what sovereignty is. There are some hints of a negative legal definition of the term, as some legal documents, as e.g. the UN Charter, define what sovereign states are not allowed to do, i.e. what sovereignty is not. *De iure* sovereignty is therefore sovereignty free of legal, instead of factual constraints.

² For an understanding of the term similar to mine, see: Robert Jackson: *Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape*, pp. 432-434, in: *Political Studies*, volume 47, number 3 (special issue 1999). An example of understanding the term in the wider sense can be found in Steven D. Krasner: *Sovereignty: Organized Hypocrisy*, 1999, Princeton University Press, pp. 3-43. Krasner distinguishes four different meanings of sovereignty. International legal sovereignty is the acknowledgment of a state by other states as independent. Westphalian sovereignty is the right of a state to organize itself without external instructions. Domestic sovereignty is the power of the state to pose itself as the bearer of supreme power inside its borders; interdependence sovereignty is the capability to control flows of persons, goods and information across state borders. In my understanding, international legal sovereignty is the only one that clearly belongs to *de iure* sovereignty, as it is constituted by acknowledgment, a legal act. Westphalian sovereignty can be compromised by contract just as well as by coercion – the constraint is legal in the first case, factual in the second. Interdependence sovereignty is a factual notion – on the one hand, a state can decide on its border regime and a certain degree of closed state borders is no condition of sovereignty. Domestic sovereignty is an important part of legal sovereignty: to be sovereign, a state must exercise a certain degree of factual control over its territory.

Nation-states emerged from a pre-modern order of several centers of power, where the power of the state, i.e. the power of the king, was only one of competing forces, the others being mainly the church and local landlords. The sovereign state managed to monopolize power on its territory and subdue its rivals. Simultaneously with the process of claiming more and more power, the state also grew as an organization. It employed more and more people and used more and more monetary resources. According to Michael Mann³, the nation-state reached today's level of absorption of monetary resources in terms of GNP per cent around 1810; at that time it already used between 25 and 35 per cent of the GNP. Nation-states also used human resources: the army, the police, the judiciary are the most important examples. The nation-state was not only sovereign on paper; it also created a mighty apparatus of enforcement.

The EU is in sharp contrast to the picture above. Even though it is a commonplace to talk about a massive and non-transparent Brussels bureaucracy, the facts are different. First of all, the EU is deriving all of its authority from the member states. It has been created by a series of international agreements and it was never questioned that original sovereignty rests with the member states. And even in the areas where the EU exercises sovereignty – delegated to it by the member states –, it is with a remarkably small physical apparatus. One scholar⁴ quotes the following facts to compare the EU cannot to a nation-state:

- Legal means. The application and supervision of application of Community law rests to a great degree in hands of the member states. There is no separate system of EU courts in the member states as there are federal courts co-existing with state courts in federal states. The only court of the EU is the Court of Justice in Luxembourg.
- Human resources. In early 1999, the EU was employing about 30 000 people altogether, half of the number of persons employed by the city of Paris. Again, this headcount is only enough to maintain a central administration, with almost no agencies outside Brussels.
- Financial resources. The EU budget is around 1 per cent of the GDP of the member states, which is incomparable to budgets of EU member states.

³ See: Michael Mann: Nation-States in Europe and Other Continents: Diversifying, Developing, Not Dying in: *Daedalus*, Summer 1993, Volume 122, Number 3, pp. 115-140.

⁴ For more details see: Jean-Claude Piris: Hat die Europäische Union eine Verfassung? Braucht sie eine? *Europarecht*, 3/2000, pp. 322-326.

- Means of enforcement. The EU has no means of law enforcement typical for a nation-state, namely it has no police or army of its own.

This overview of factors is enough to show that, if one can speak of sovereignty of the EU, it must be of a different nature than the sovereignty of typical nation-states. One is tempted to ask whether it is possible at all to speak about sovereignty at a European level, given these weak means of enforcement. The answer is yes: the EU does have sovereignty in a legal sense; it creates legal norms that are superior to legal norms of the member states. The member states do not enjoy legal supremacy in areas entrusted to the EU. These measures are also complied with. It is true, that enforcement rests with the member states; however, in the overwhelming majority of cases EU measures are complied with, i.e. the EU fulfills the criterion of efficacy.

First let us take a look on the nature of EU sovereignty. The EU has many features that distinguish it from an international organization. There are no internal borders disappeared between the member states and the free flow of goods, persons, services and capital are guaranteed by the founding treaties. There is an EU citizenship. All citizens of the member states are citizens of the Union and they have rights transcending the framework of nation-states, among others the right to move and freely reside on the territory of the member state and to vote and stand as a candidate at municipal elections and elections to the European Parliament on the territory of a member state he is not a citizen of. All these features transform the traditional notion of nation-state sovereignty. However, probably the most important development in this regard is what is called today the emergence of a separate legal system, called “EU law”, “EC law” or “Community law”.

The terminological ambiguity is not of crucial importance. It is important to note, though, that the term “EU law” might be misleading. Since the adoption of the Maastricht Treaty, the European Union consists of three pillars. The first pillar is what is today called the European Community, the single community that arose from a gradual unification of the European Coal and Steel Community, the Euratom and the European Economic Community. The other two pillars are the Common Foreign and Security Policy and cooperation in the field of Justice and Home Affairs. The supranational decision-making procedure is only typical for the first pillar; the other two are mainly intergovernmental, i.e. decisions are typically made by unanimous consent of all member states. Therefore I will use the term “Community law” to refer to the legal norms created by the European Community.

The sources of Community law and the declaration of their binding force can be found in Article 249 of the EC Treaty. According to this article:

“In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.”

Regulations, directives and decisions undermine the traditional notion of state sovereignty. In the case of regulations and directives it is those adopted by qualified majority voting in the Council, because these are applicable and binding on member states that voted against them⁵. In the case of decisions, these can address nationals of member states, who under the traditional concept of international law are not its subjects.

Some authors claim that this is nothing more than a device to make decision-making faster and easier, emphasizing that these decisions mostly include the internal market and are therefore rather technical in nature. In my opinion, this understanding of qualified majority voting resulting in instruments superior in legal force to the domestic legal orders of member states rests on the presumption that decisions regarding the creation of a free internal market are not “important” or “interesting” enough to pose a genuine challenge to sovereignty. This view is false and its falsity can be demonstrated by two different arguments.

On the level of everyday politics, if qualified majority voting were a method of decision-making common in international relations and with no special impact on state sovereignty, extension of areas of qualified majority voting would be much easier than it actually is. The recent Nice summit showed that member states were defending strongly their right of veto in areas as tax policy, social security, visa and asylum regimes or structural development funds⁶. The very fact the member states

⁵ According to the weighting of votes in the Council effective before the Nice summit, the total of votes in the Council was 87 and the qualified majority was 62. For instance, Germany, Great Britain and Sweden had 25 votes together, which means that these countries could be overvoted.

⁶ For a concise and revealing analysis of the summit, see *Der Spiegel*, 51/2000.

guard their sovereignty – expressed in unanimous decision-making as opposed to qualified majority voting – and trade it with utmost care is a proof that governments do perceive these areas as important and qualified majority voting as a threat to their sovereignty.

On the other hand, from a legal theoretical point of view, there are no “important” or “less important” decisions. The very fact of infringement of sovereignty is important in itself, regardless of the areas it concerns.

The nature of legal act passed by the Community is crucial to determine the existence or the nature of the transformation of sovereignty. The importance of a legal system as a distinct feature of a state is widely recognized, but Hans Kelsen was the scholar who formulated the most extreme position in this regard⁷. According to Kelsen, the state as such cannot be grasped and defined in any other way than by identifying the state with a legal system. There is no sociological fact that can imply the unity of a state; the only thing that a legal scholar can say with certainty is that the state is a distinct legal system that is not dependent on any other legal system.

In his analysis of legal systems, Kelsen introduces the concept of a *Grundnorm*⁸. The line of argument leading to the concept is the following: suppose a man is deprived of his liberty and thrown into jail. How can this act be validated? It is validated by a court sentence. How is the court sentence validated? It is validated by the Criminal Code. The Criminal Code is validated because it was adopted in a procedure prescribed by the Constitution. The Constitution may be validated by a former Constitution; but even if it is, there will come a point when this chain of validation is lost. This is the point when the *Grundnorm* comes into the picture. It is the norm prescribing that the laws passed by the historically first legislative body shall be valid as norms. In other words, the *Grundnorm* gives the legal system the character of a normative system.

Regarding international law, Kelsen is a strict monist; i.e. in his opinion the domestic law of each state and international law form one system of norms⁹. In his opinion the dualistic view, teaching that domestic law and international law are two distinct system of norms and international law can become part of state law by reception is nothing else than hidden monism, although of a reversed kind: what it really claims is that the only system of norms that is rightly called law is domestic

⁷ The argument can be found most clearly in Hans Kelsen: *Staat und Recht*, in: Friedrich Koja: *Hans Kelsen oder die Reinheit der Rechtslehre*, Wien, 1988, pp. 65-89.

⁸ Hans Kelsen: *Reine Rechtslehre*, Scientia Verlag Aalen, 1994, pp. 63-66.

⁹ *Ibid.*, pp. 129-155.

law, as international law has no validity independent on domestic law. Kelsen refuses this view. The simultaneous existence of the legal systems of several states is only possible in the case that there is another system coordinating the validity of different domestic legal systems. This system is international law and the *Grundnorm* of international law, that every state is supreme among its borders makes the coexistence of distinct legal systems. The primacy of international law makes state sovereignty possible in a legal sense, as every sovereign state is recognized as sovereign by the *Grundnorm* of international law.

The dilemma faced by scholars of European integration is whether the existence of Community law can be included in this basic framework. It is widely recognized that the number of legal acts of the European Community and the impact of these acts on member states and their citizens cannot be compared to other international organizations. But is this only a difference in quantity or also in quality? Can it be implied that the European Union is an international organization *sui generis*, transcending the traditional framework of international cooperation?

Neil MacCormick gives an affirmative answer to this question¹⁰. In his view one cannot deny the existence of a Community legal order; this is given by the decision of the European Court of Justice¹¹ tacitly accepted by all member states. The question remaining is whether Community law has an independent source of validation from international law on the one hand and the domestic law of member states on the other. Given the assumption – formulated by Kelsen – that international law validates the legal orders of states, there are three ways the chain of validation can run. International law can validate Community law, which in turn would validate member-state law. Community law and member-state law can be validated by international law at the same time; in this case, Community law is validated by a separate *Grundnorm* than that of the legal system of any of the member states. Finally, Community law can be validated by member-states law, which is validated by international law.

The first model is that of a federation: the only relevant legal system on an international level is that of the federation; the legal systems of the states are subject to the federal constitution. This is clearly not the case in the EU, which derives its powers from the member states and not vice versa.

¹⁰ Neil MacCormick: Liberalism, Nationalism and the Post-Sovereign State, in: Political Studies, 1996, pp. 553-567.

¹¹ The decision in the case Costa v. ENEL [1964] ECR 585

This fact leads us to the third model. The EU was created by the member states; they determine its goals, entitlements and scope of action, not vice versa. Even though EC law is created by a supranational body, it is enforced by the individual member states. Does it mean that Community law is validated by the legal systems of member states and in fact it functions, instead as a legal system of its own, as a valid but special part of French, Spanish and so on, law only? Not according to MacCormick, who uses the concept of the “internal point of view”, introduced by H.L.A. Hart¹² to prove this point.

H. L. A. Hart, one of the most important legal positivist thinkers of the 20th century, developed an elaborate to prove that a point of view known as rule scepticism is false. Rule scepticism teaches that a legal norm is nothing more than an expectation and prediction of what official persons applying the norm will do. According to Hart, however, there is much more to a legal norm than that; and this is what he calls the internal point of view. In every society, says Hart, there are two kinds of people; those, to whom legal norms are just an external, foreign constraint on their behaviour and those, to whom these norms are the measure of their behaviour. It is absurd to say that when a judge is deciding a case, the legal norm according to which he is deciding it is a prediction of his own future behaviour to him; in this case, the legal norm is the measure of the judge’s conduct. The argument does not say that every person in the given society has the internal point of view of the judge; but it does say that to the judge, the legal system gives a sense only as a system of norms, not as a system of expectations.

Similarly, if thinking of the legal system of the European Community, there can be no doubt that the persons applying it do not think of it as of a function of their own legal system. A Spanish judge of the European Court of Justice does not think of a Council directive as of a part of Spanish law and a French judge of the same court as of a part of French law; they both think of it as of a part of a separate Community legal system, the validity of which is not dependent on the domestic legal systems of the member states.

To admit that MacCormick’s thesis is correct has very far-reaching consequences. The implications of the thesis go to the heart of the Kelsenian model of sovereignty as an independent legal system. Is the European Community a sovereign entity, because its legal system is not derived from any other? One has to say, that in the areas reserved to it by the founding treaties, it is.

¹² H.L.A. Hart: *The Concept of Law*, Oxford 1961, ch. 6.

The Paradox of Voluntary Obligations

In his article on sovereignty and international law¹³, the Hungarian international law scholar, László Valki concludes that Hungary's accession to the EU would not infringe its sovereignty.

In his analysis, Valki concludes that international law has never produced a definition of sovereignty; even the international legal documents signed under the umbrella of the UN, which are supposed to infringe it, only define it in a negative way, saying what sovereign states cannot do, i.e. what sovereignty is not. For instance, states have to respect other states as equals, must not endanger the territorial integrity of other states and cannot use force to resolve conflict. In Valki's view, the only positive definition of sovereignty that one can adopt in the light of this state of affairs is that states acting independently on the international scene are sovereign. This is a minimalist version of the definition of external sovereignty.

Regarding internal sovereignty, Valki builds on Kelsen's thesis of the unity of state and law. According to Kelsen, a legal theorist cannot define the state otherwise than as a closed legal system. All other definitions are too vague and lead one out of the field of legal theory to a general theory of the state, popular in 19th century Germany but criticized by Kelsen. Valki claims, following the Kelsenian model, that sovereignty means the existence of an independent legal order, not subject to any other legal order, or, the way other scholars put it, constitutional independence¹⁴.

Following this conceptual introduction, Valki goes on to consider three international organizations that have, or are said to have an impact on the sovereignty of their member states. These are the UN, NATO and the EU. His analysis is based on two aspects: 1., what kinds of decision-making powers are in the hands of these organizations and 2., to which degree are the decision-making bodies "alienated" from the members. He finds that in times of peace, NATO has only marginal competences and therefore does not infringe sovereignty. The UN Security Council has, on the other side, powerful tools: it can authorize the use of force against states violating international peace. The Security Council is, on the other hand a decision-making body that is rather "alienated" from the UN membership base. It consists

¹³ Valki László: *Mit kezd a szuverenitással a nemzetközi jog?* In: *A szuverenitás káprázata*, Budapest, 1996.

¹⁴ See for example: Robert Jackson: *Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape*, in: *Political Studies* (1999), XLVII, pp. 431-457

of a limited number of UN members and its permanent members have the right of veto, which makes them superior to other Security Council members.

Valki's point about decision-making in the EU is that the element causing most concern about this mechanism, qualified majority voting in the Council is not infringing the sovereignty of the member states. He sees the Council of the European Union as a decision-making body not at all alienated from the member, as opposed to the UN Security Council. In the Council, all member states are represented, so there is no effect of decision-making without representation as in the case of the UN Security Council. The issue that remains is that of voting: as in every situation, when qualified majority is requested instead of unanimity, there may be some who do not agree but the resolution is passed against their will and will become binding on them. This is a standard procedure; but there is another dimension to it whenever those participating are sovereign states. Valki argues that member states decided voluntarily to abide by these rules and therefore any decision-making by qualified majority voting is a specific form of exercising of their sovereignty instead of giving it up. I believe that this view is only partially true and to see its consequences we have to look at sovereignty from a different point of view.

International cooperation is indeed based on the conception of a fully sovereign state as the main subject of such cooperation, entering voluntarily into relations with other states. The binding character of any obligation assumed in the course of such cooperation is constituted by consent of the participants. *Pacta sunt servanda* thus becomes and remains the building block of international law, as states do not recognize any formal law-making and law-enforcing agency over themselves. The hypothetical opposite of this situation would be a super-state, in fact a federal state, with a distinct, federal level of law-making and enforcement present.

A sovereign is somebody, whose decision must be obeyed and cannot be appealed. We can think of e.g. the 19th century nation-state as sovereign in this sense. A state, passing its laws, enforcing the obedience to those by its citizens and having the final word in most important questions of public life, a state considering even the waging of a war as a legitimate means of pursuing its interests is the one best suited to illustrate the model of unrestrained, "sovereign" sovereignty.

This hypothetical basic model can be refined, as having the right to decide does not necessarily mean having to pass the decision itself: a state can delegate the power to decide certain issues to other entities. The granting of state-supervised quality certificates by private laboratories to producers would be an example of delegating internal sovereignty, i.e. the ability to act as a bearer of supreme power towards citizens; signing an international treaty establishing an international agency

with powers to make binding decisions in international matters would be an example of delegating external sovereignty, i.e. the capability of a state to act independently towards other states. In these cases the state is clearly giving up a part of its decision-making power by enabling other persons to make decisions it was originally able to take. It is also assumed, however, that the state acted voluntarily and that it can take back the consent it gave at any time. Actual decision-making power or competence and the power to delegate competence are hence two different aspects of sovereignty and it seems that the power to delegate and reclaim is more important; as long as a state has this, in German *Kompetenz-Kompetenz*, it state can still be treated as fully sovereign even in such a hypothetical situation that it delegated all actual decision-making power to other entities, provided that it did so voluntarily and that it can successfully claim back the delegated powers when it chooses to do so.

According to the above consideration no theoretical difference should be made between a state with a highly centralized administration, withholding itself from international cooperation, and a de-centralized federal state, with strong internal autonomies and numerous international commitments, including voluntary acceptance of the decisions of international organizations and courts. Indeed, if one were to choose a formalistic approach, one should maintain that as long as the possibility of regaining the delegated competence exists, sovereignty is just as complete as if the competence was actually exercised by the state. Only if there is a sovereign, i.e. binding and ultimate decision passed with effect on a state and that state did not enter voluntarily into the relation out of which that decision arose, can one speak of a real shift of sovereignty.

Even if one accepts the formalistic way of looking at sovereignty as described above, one must admit that there are at least different grades of delegating sovereignty. To use the example of international cooperation, a state would certainly not terminate a decade-long, extensive and profitable relationship because of one single decision contrary to its interest; however, it might do so in the case, where, say, the particular treaty would be of smaller extent and importance. If we consider the loss of prestige it would mean to a member state of the Council of Europe to rescind the European Convention of Human Rights, we can understand that even the decisions of the European Court of Human Rights in very sensitive areas have been accepted.

Hence a more realistic approach to the delegation of decision-making power can be deduced. According to the realist model it can be assumed, that given the immense importance of international cooperation today, the political possibility of

disaffiliation of member states in major international organizations, including the EU is rather low. Certainly, this is a factual statement, nothing to do with the normative language of law. However, as Georg Jellinek wrote¹⁵, the politically impossible cannot be subject to the inquiry of jurisprudence. In other words, if one assumes that the possible economic, political and symbolic loss arising from terminating membership in the European Union would outweigh the acceptance of any reasonable decision of the organs of the Union by a member-state, even if contrary to its interest, one can move to a realistic position and assume the following:

1. Sovereignty consists of two basic elements: the competence to pass ultimate and binding decisions certain matters and the right to delegate this competence to other bodies as the state, with maintaining the right to reclaim it.
2. Sovereignty cannot exist as only the right to delegate. We would hardly speak of a state as sovereign that would not actually exercise a significant bunch of its decision-making power.
3. Even if sovereignty is formally not infringed by delegation, the political risks of reclaiming certain powers are high enough to discourage a state from taking such a step.

I believe that European integration is such an irreversible process and a legal theoretical inquiry to the nature of the European Union should assume this irreversibility. Irreversibility means first of all ruling out the possibility of an end of the European Union by terminating all founding treaties and thus the entire collapse of the experiment, but also a radical diminution of powers of the organs of the Union.

Another argument against the point the consent justifies any later obligation is the principle of *rebus sic stantibus* in international law. According to this principle, a state can terminate its obligation under an international treaty if circumstances changed so dramatically that a state would not enter once again in the same obligation under the changed circumstances. This argument in the case EU decision-making is still stronger than in the usual sense. *Rebus sic stantibus* normally applies to one single treaty; even if manifold obligations can arise from one treaty, these can be still relatively clearly identified and foreseen at the time when the treaty is signed. International law, however even in this rather simple case provides for unforeseeable change of circumstances. In the case of EU decisions, the case is much

¹⁵ Georg Jellinek: *Allgemeine Staatslehre*

more complicated. Not only the time factor can bring about changes of circumstances, but also the scope of decisions to be made is not completely foreseeable, either. The EU has powers to regulate certain areas but it cannot be said exactly what kind of decisions will be taken under each heading. Therefore the *rebus sic standibus* principle seems to apply with even more force than normally.