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European Restatements of Sovereignty

Damian Chalmers^{*}

Abstract: European Union debates have led to a change in how sovereignty is deployed. Its presence now has to be justified through its relationship to the claims of EU law: be it as a rival to the latter's authority or as something that infuses it. This need to justify has led to sovereignty being understood in terms of the wider value it brings to political systems and their citizens. To find this value, recourse has been had to older traditions which see sovereignty as a counterpart to government, with EU law being understood as a government order. This has cast sovereignty in three ways. The first sees sovereignty as a series of activities which go to making up a domestic human order, be this order called a people, nation, public or society. This order transcends and constrains government as it goes to the identity and mission of the domestic political system. These activities are to be protected from EU law insofar as it is a governmental order. The second sees sovereignty as something which ordains EU law, granting it authority, and, consequently, retaining the prerogative to patrol the democratic quality of EU law. The third argues that if EU government involves these bodies seen as most capable of expressing the will of this sovereign human order in its decision-making, it can enjoy sovereignty. The value of sovereignty has, however, always lain in the distinction between it and government. This allows limits to be placed on the reach of government and external controls placed on its activities. This union of sovereignty and government reaches into the darker traditions of sovereignty. It grants the Union governmental machinery a largely unfettered power of rule to realise the governmental objectives it sets itself. As a sovereign, it can free itself not merely from external constraints but even those instituted by EU law. Its powers can be intrusive, unaccountable and extensive. And, indeed, this is what is happening as Union measures unfold during the Euro area crisis.

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I. INTRODUCTION: THE SOVEREIGN PUZZLE

Sovereignty, it can appear, is part of the DNA of the European Union. Its attachment to the European integration project has led to the latter being seen as an exemplar of a new way of organising life beyond the nation State.¹ That most prominent of Europeans, Jacques Delors, thus stated that the project was ‘building a community whose member states jointly exercise a measure of pooled sovereignty through fully-fledged common policies’.² Over twenty years later, Commission President Barroso reiterated this by calling for a ‘democratic federation of nation states that can tackle our common problems, through the sharing of sovereignty in a way that each country and each citizen are better equipped to control their own destiny’.³ However, if Delors associated pooled sovereignty with a pooled government, Barroso’s vision had sovereignty as enabling self-government to flourish.

The beneficiary of this self-government is unclear, however. Euro-Federalists argue that the true sovereigns in Europe are its citizens. They argue that the ‘raison d’être’ of the European project is the regaining of sovereignty, by which they mean giving European citizens back ‘control over the world in which they live’.⁴ By contrast, opponents of European integration see sovereignty as simply a property of States. The Charter of the European Freedom and Democracy political grouping ‘favours an open, transparent, democratic and accountable co-operation among sovereign European States and rejects the bureaucratisation of Europe [...]’.⁵ If sovereignty is a property of States which cannot be acquired by anybody else, it can still be threatened by the Union.

This sense that parties are talking about different things when they talk of sovereignty is reinforced by a further position, which is expressed in the Lithuanian Constitution. Under that Constitution, sovereignty belongs to the Lithuanian nation, and nothing can restrict or limit that sovereignty.⁶ That ‘nothing’ includes EU law. When Lithuania acceded to the Union, a Constitutional Act was passed providing for primacy of EU law over Lithuanian law.⁷ This does

¹ R. Keohane, ‘Ironies of Sovereignty: The European Union and the United States’ (2002) 42 *JCMS* 743, 756-757; J. Ruggie, ‘Territoriality and Beyond: Problematising Modernity in International Relations’ (1993) 47 *International Organisation* 139, 171-172.

² J. Delors, ‘European Integration and Security’ (1991) 33 *Survival* 99, 103.

³ J. Barroso, ‘State of the Union Address 2012, Speech 2012/596, http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm <accessed 1 February 2013>.

⁴ ‘Hannover Speech by Guy Verhofstadt on the decision by the German Constitutional Court and the ESM Treaty’ 18 September 2012, <http://www.alde.eu/press/press-and-release-news/press-release/article/verhofstadt-sovereignty-is-better-pooled-at-eu-level-than-lost-in-a-global-world-39742/> <accessed 2 February 2013>

⁵ <http://www.efdgroupp.eu/about-us/who-we-are/charter.html>. <accessed 1 February 2013>

⁶ Constitution of the Republic of Lithuania, articles 2 and 3.

⁷ Constitutional Act of the Republic of Lithuania on Membership of the European Union 2003, para 2. It is believed that EU law has precedence over all Lithuanian law other than the Constitution. P. Ravluševičius, ‘The Enforcement of the Primacy of European Union Law: Legal Doctrine and Practice’ (2011) 18 *Jurisprudencija* 1369.

not limit Lithuanian sovereignty, per se, with sovereignty seen rather as a structure which requires all institutions to act in the interest of the Lithuanian nation and allows for Lithuanians to rise up where this does not take place.

These frequent and diverse usages arise because sovereignty is one of those terms through which actors make sense of their legal and political worlds and express strong beliefs about the organisation of political life. Sovereignty mediates the type of associative tie needed to sustain political community, the role of government within modern life and, most fundamentally, the nature of the relationship between rulers and ruled. A failure to engage with these different usages is both a failure to engage with these worlds and a failure to be true to the tradition of sovereignty: a concept whose meaning has changed significantly over time.⁸

This essay will argue that EU law shifted understandings of sovereignty by presenting it as something to be justified. Sovereignty had to be asserted against the claims of EU law. To prevail, it now had to present a value which it brought to the polity and its citizens. This led to a fragmentation of sovereignty as parties relied on different traditions of the relationship between sovereignty and government to assert this value. This relationship was handled in three different ways.

In the first, sovereignty is presented as a human order to be protected from EU law. This human order is presented as those activities most intimately connected with a vision of domestic society as an eternal, indivisible body constructed around a shared lived experience. These activities include welfare provision, foreign policy and defence, criminal justice, fundamental rights and those legal institutions traditionally concerned with relating collective values and narratives to local lives, be these family, religious or educational law. If this vision was historically used to emphasise the constrained nature of government and the presence of human activity and other forms of rules beyond it, within EU law it has been used, over-formalistically, to ring-fence a series of activities from scrutiny on the basis that they are too central to making us who we are.

In the second tradition, the sovereign ordains government. National sovereigns authorise EU law, and it governs by virtue of their blessing. EU law is granted a different quality of power from national law in that it is derived and oriented to particular problems whereas national law is general and original in nature. Sovereignty becomes associated with a series of external democratic controls to be imposed on EU law by national law. The challenge with this tradition is that the sovereign only steps in occasionally; more to grant a democratic blessing to government than to hold it rigorously to account.

The third vision is the most troubling. In this, sovereignty is deployed not to check EU power but to justify greater administrative power for the Union than it would otherwise be allowed. Such a vision sees sovereignty and government

⁸ On the steady change in the meaning of the term see J. Bartelson, *A Genealogy of Sovereignty* (1995, Cambridge University Press, Cambridge) 88-236; B. Teschke, 'Geopolitical Relations in the European Middle Ages: History and Theory' (1998) 52 *International Organisation* 325, 350-355.

coming fully together so that the sovereign actively governs. Typically, this is done through the active involvement of national parliaments in forms of European integration allows the Union to claim that it is acting out the sovereign will of EU citizens or peoples, and thereby engaging in self-government. However, this is something of a slippage. In other words, the Union uses sovereignty as a legitimisation strategy, whereby its claim to involve sovereigns – be they parliaments, peoples or citizens – in its government grants the European integration process a general power of sovereign rule that largely stands outside the law.

II. THE JUSTIFICATION OF SOVEREIGNTY AS A COUNTERPOINT TO EU GOVERNMENT

The EU ‘sovereign question’ is often cast as one of possession. The central issue is who possesses sovereignty as sovereignty is, in this debate, the ultimate authority over rule. It can, thus, only be exercised by one body at any time over any field of activity. This characterisation of sovereignty makes questionable assumptions. Sovereignty is seen as a fungible property which can be transferred from one context to another with no real change in its qualities, other than who possesses it. Alongside this, any limits on national sovereignty, to be effective, must endow the other legal order with equivalent qualities, as otherwise the latter will operate under the shadow of the sovereign and never have sufficient power to act as an independent legal order.

Van Gend en Loos is the entry point for this debate.⁹ It set out a formulation about the relationship between EU law and sovereignty which has been reiterated constantly since, most notably in *Opinion 1/09*:

the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals [...]. The essential characteristics of the European Union legal order thus constituted are in particular its primacy over the laws of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.¹⁰

This line of reasoning does not see sovereignty as transferrable or fungible but distinguishes between two sources of legal authority: that of EU law and that of

⁹ Case 26/62 *Van Gend en Loos* [1963] ECR 1.

¹⁰ *Opinion 1/09 on a unified patent litigation system* [2011] ECR I-1137, para 65.

national sovereignty. Asymmetry is central to understanding the relationship as no sovereignty is claimed for EU law. The central challenge becomes that of identifying those qualities of EU law which give rise to and characterise its authority and relating these to ideas of State sovereignty. As a consequence, and problematically for many accounts, whilst there are clearly some similarities between this authority and sovereignty there are also a number of differences. Like a sovereign, the EU claims a power to found a rule of law for itself which generates individual rights and obligations. If sovereignty claims a unity for a legal order and its political system,¹¹ the characterisation of the EU as a new legal order suggests this for the Union and EU law, too. However, other similarities are missing, notably the most fundamental quality associated with a sovereign, the 'right to let live'.¹² EU law claims no equivalent for itself. Furthermore, the justification for its authority is grounded on a different calculus. The traditional justification for sovereignty is that it represents the unity and autonomy of the body politic.¹³ *Van Gend en Loos* justifies EU legal authority in the bringing together of human beings for collective purposes and the establishment of institutions with powers of rule to secure these purposes. If one is based on the claim of a timeless community, the other rests on the claim of common purpose.

Van Gend en Loos presented sovereignty, instead, as something which required justification rather than as something to be acquired by the Union. Its displacement of sovereignty by EU legal authority put sovereignty into competition with EU law as it begged the question as to why or when each should prevail at the expense of the other.¹⁴ *Van Gend en Loos* suggested that resolution of this question lies in the relative value of sovereignty and EU law. In particular, it associated sovereignty with two forms of value. It is granted an *end value*. It is valuable in itself to be sovereign, and holders of sovereignty hold it only by virtue of certain valued attributes which enable them to be sovereign. Thus, only the sovereign has original power and only she is able to speak as representative of the State.¹⁵ *Van Gend en Loos* recognises this end value in the tacit admission that something of real value is being limited by the EU, and, more explicitly, by the statement that sovereignty is something which only the States themselves can limit. Sovereignty is also given a *use value*. It allows its holder to do other things of value. The sovereign can generate the conditions for, for example, collective wealth, security, social solidarity and realisation of individual freedoms. EU law recognises this by seeing sovereignty as something to be traded, through the

¹¹ H. Lindahl, 'Sovereignty and Representation in the European Union' 87, 87-90 and 101-110 in N. Walker (ed) *Sovereignty in Transition* (2003, Hart, Oxford-Portland).

¹² G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998, Stanford University Press) 142.

¹³ M. Loughlin, *Foundations of Public Law* (2010, OUP) 186-196.

¹⁴ The description of the Treaty limiting national sovereignty was in line with a number of constitutional provisions sets up after the Second World War which provided for limitation of sovereignty to enable international cooperation. B. de Witte, 'The European Union as an International Legal Experiment' 19, 26-28 in G. de Búrca and J. Weiler (eds) *The Worlds of European Constitutionalism* (2012, CUP).

¹⁵ On this debate within the context of US independence see A. Amar, 'Of Sovereignty and Federalism' (1986) *Yale Law Journal* 1425, 1435-1437.

placing of limits on it, to allow Member States to pursue a number of collective goods, notably the single market.

These values fit with traditionalist understandings in which the sovereign is granted both an end value in the form of a special status (i.e. only the sovereign can speak in the name of the State) and a use value in that, as representative of the body politic, it has to act in the common good.¹⁶ However, these traditions had historically been deployed to reinforce a unitary political agency, the State.¹⁷ By contrast, EU law seeks to fragment this political agency. Two systems, the EU and the Member State, are established with each having a right to govern or rule. Sovereignty moves from being a concept which consolidates and integrates rule to becoming a terrain for competition between different spheres of rule and government. If this led to some competition over the end value of sovereignty in the form of debates over who has original power to found legal authority within the Union, this competition is largely symbolic.¹⁸ This power is, alone, a hollow power. It grants a status without offering up anything more finite about the scope or intensity of that power. One can be a sovereign over a classroom or the world. It can be a power noted for not being exercised or for being used intensely. Alongside this, the absolute notion of the end value, namely that it claimed a special status for the sovereign to rule and was silent about other forms of rule, was unhelpful in regulating a relationship between sovereignty and other forms of power. The end value of sovereignty could found legal rule within a territory, yet, insofar as wide-ranging legal authority could then be transferred to the Union, the end value of sovereignty had nothing to say on the limits or operation of such authority.

The use value came increasingly to be deployed by both proponents and opponents of EU legal authority as a condition for determining the presence of sovereignty. Reference was nearly always made to the use value of sovereignty, and what further goods it enabled, as something to bolster the respective arguments. And this shift to the presence of use value to justify the presence of sovereignty is the real revolution of EU law. It led some to claim that, as sovereignty had insufficient use value, we were moving to an age without it.¹⁹ More commonly, it has led to sovereignty becoming increasingly configured around the value of what it enables.

¹⁶ Q. Skinner, 'The Sovereign State: a Genealogy' 26, 37 in K. Kalmo and Q. Skinner (eds) *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (2010, CUP).

¹⁷ On the importance of this B. v. Roermond, 'Sovereignty: Popular and Unpopular' 33, 42-45 in N. Walker (ed) *Sovereignty in Transition* (2003, Hart, Oxford-Portland).

¹⁸ I.e. European Union Act 2011, section 18. This provision emphasising that EU law derived from the European Communities Act 1972 is seen as largely symbolic even within the notes to the Act. Explanatory Notes, para 109.

¹⁹ D. Kostakopoulou, 'Floating Sovereignty: A Pathology or a Necessary Means of State Evolution?' (2002) 22 *Oxford Journal of Legal Studies* 135; A. Jakab, 'Neutralising the Sovereign Question. Compromise Strategies in Constitutional Argumentations before European Integration and since' (2006) 2 *EU Constitutional Law Review* 375.

In some instances, sovereignty has been gauged against how far it advances or restricts ideas of freedom. In its *Lisbon Treaty* judgment, the German Constitutional Court stated that sovereignty stood within the German constitutional order for a ‘freedom that is organised by international law and committed to it’.²⁰ It was compatible with this sovereignty to enter arrangements which advanced this freedom internationally – be it through securing peace, transnational collective goods or transnational democratic arrangements – but it must do in a manner which did not unduly restrict domestic collective and individual freedoms. By contrast, the Polish Constitutional Tribunal and Czech Constitutional Court in their *Lisbon Treaty* judgments looked not at whether sovereignty advanced freedom in a generic manner but whether it advanced the practical freedom of the State. Both argued that by allowing the State to do things it would otherwise not be able to do, EU law was enlarging its freedom and therefore extending its sovereignty.²¹ In other cases, sovereignty becomes something to be curtailed to secure other fundamental values. The Estonian Supreme Court has therefore stated that the core essence of Estonian sovereignty is ‘the right of discretion in all matters, irrespective of external influences’.²² This autonomy can quite easily be restricted by EU law. These restrictions will only be lawful if they advance other Estonian constitutional values and the Union does it in a proportionate manner. In this manner, sovereignty becomes a prism through which to assess the scope and worth of Union action.

The duty to justify the presence of sovereignty in terms of its use value only exists when a claim has been made that EU law should limit national sovereignty. The *incidence* of EU law will, therefore, determine when this happens. EU law will also frame the *manner* of justification. The reasons for EU legal authority are reasons why it should exercise greater authority than national law. The sovereign justification is a response to this. It is a response, moreover, which centres around showing either that EU legal authority can be accommodated, that EU law carries unacceptable costs or that national sovereignty provides something not offered by EU law. In all cases, this will be informed by *particular traditions* of sovereignty as these provide the vocabulary for formulating such responses. The central tradition in this regard is the historical distinction between sovereignty and government. This distinction is now territorialised. EU law is cast, in this regard as a governmental order: a particular conception and ordering of legal and political power.²³ The sovereign is the national legal order.

²⁰ *Re Ratification of the Treaty of Lisbon* [2010] 3 CMLR 13, para 223.

²¹ See respectively K 32/09, *Treaty of Lisbon*, Judgment of 24 November 2010, 21-22; Pl. ÚS 19/08 *Lisbon Treaty I*, Judgment of 26 November 2008, para 107.

²² Case 3-4-1-6-12 *Request of the Chancellor of Justice to declare Article 4(4) of the Treaty establishing the European Stability Mechanism in conflict with the Constitution*, Judgment of 12 July 2012.

²³ The idea of government traces its roots to *oikonomia* in which the metaphor of the household (*oikos*) is seen as something to be enjoyed in common (*koinon*). Government sees political communities in the image of a family whose everyday affairs have to be taken care of by a ‘gigantic, nation-wide administration of housekeeping’. H. Arendt, *The Human Condition* (1958, University of Chicago) 28. Its rule is administrative and impersonal. Its focus is behaviour, which concerns how individuals relate to

III. SOVEREIGNTY AS A HUMAN ORDER PROTECTED FROM EU LAW

(i) SOVEREIGNTY AND THE DOMESTIC HUMAN ORDER

Formally, EU law claims an unconstrained power to limit national sovereignty: the latter cannot be invoked as a defence against the requirements of EU law.²⁴ This led a current leading member of the Court of Justice to declare that there is simply no nucleus of sovereignty that Member States can invoke against the Union.²⁵ Sovereignty becomes, on this view, what EU law leaves behind for Member States. However, this is too crude. For most of its life, the activities of EU law have been limited. They have not constituted the norm of legal life within the Member States but the exception. In the long period prior to Maastricht, the EU legal system focussed predominantly on addressing market externalities.²⁶ This regulation did not intrude on politically sensitive institutions. The single market, at least up until the mid-1990s, did not seek to establish those institutions of market building more central to domestic political economies, such as property rights or governance mechanisms involving direct rule.²⁷ In like vein, there was not much direct regulation of relations between private parties. The most wide-ranging instrument, the Directive, was unable, directly or indirectly, to impose obligations on private parties until 1990.²⁸

The pressure placed on national legal autonomy was thus confined. Furthermore, EU law was accepted in many national legal systems precisely on this basis. This shaped understandings of sovereignty. National sovereignty became a reserved sphere not to be touched by EU law. This reserved sphere was, moreover, not something residual but rather that sphere of action which provided a central source of meaning by ‘touch[ing] on the intelligibility of the social world more generally, on one’s sense of coherence, continuity and vibrancy of the form of life into which one is inscribed and from which one derives one’s most basic sense of orientation in the world’.²⁹

In 1973, in *Frontini*, the Italian Constitutional Court stated that EU measures could not violate fundamental rights protected by the Italian Constitution because of the limited powers of the Union. Powers had been transferred to the Union on

particular conformities rather than to other individuals. H. Arendt, *ibid.*, 38-49; G. Agamben, *The Kingdom and the Glory* (2012, Stanford University Press, Stanford) 16-52.

²⁴ I.e. Case C-196/04 *Cadbury Schweppes v IRC* [2206] ECR I-8031, para 40. At more length Case C-141/07 *Commission v Germany* [2008] ECR I-6935, Opinion of Advocate General Bot, paras 88-89.

²⁵ K. Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ (1990) 38 *American Journal of Criminal Law* 205, 220.

²⁶ G. Majone, ‘The Rise of the Regulatory State in Europe’ (1994) 17 *West European Politics* 77.

²⁷ N. Fligstein and I. Mara-Drita, ‘How To Make a Market: Reflections on the Attempt to Create a Single Market in the European Union’ (1996) 102 *American Journal of Sociology* 1.

²⁸ Case C-106/89 *Marleasing v La Comercial* [1990] ECR I-4135.

²⁹ E. Santner, *The Royal Remains: The People’s Two Bodies and the Endgames of Sovereignty* (2011, University of Chicago) 3.

the basis of a ‘precise criterion of division of jurisdiction by subject matter’.³⁰ The transferred subject matter was confined to economic relations with it ‘difficult to form even abstractly the hypothesis that a [Union] Regulation can have effect in civil, ethno-social or political relations through which provisions can conflict with the Constitution’.³¹ A similar ethos, albeit more cryptically phrased, is present in the reasoning of the German Constitutional Court in *IHT*. It characterises the Union as not a State but as both a sui generis community and an inter-State institution.³² It is, in other words, an association of human beings which have come to be governed. The European Union, moreover, is only a settlement which governs. Article 24 (the then relevant provision of the German Basic Law) allowed for a transfer of sovereign rights to inter-State institutions, but was not, according to the Court, to be read literally. The State’s exclusive right to rule remained intact with the provision merely requiring German law to open itself up to not to EU law rule but to ‘the direct effect and applicability of law from another source’.³³ The Union, moreover, is something which does not go to the deeper political imaginary of Germany constitutional democracy. It is not to do anything, therefore, which ‘encroach[es] on the structures which go to make the [German constitution] up’. These structures are not to be seen exclusively in formal terms but rather encompass those understandings which go to the identity of the Constitution: its sense of what it is about. We find similar language used in *Cohn Bendit*, the well-known decision of the French Conseil d’Etat refusing to grant direct effect to Directives. This decision was justified partly on a literal reading of the Treaty, which did not provide in the Conseil’s view for direct effect. However, a prior reason was given, namely that EU law, notably Article 56 of the Treaty,³⁴ excluded EU law-making over the ‘ordre public’;³⁵ that concept in French law, wider than public policy, which comprises that body of laws which allow ‘life in society and the organisation of the Nation’.³⁶

What was to be the subject-matter of this reserved space? Within the Westphalian model, territory was used to establish the parameters of national sovereignty. This could not be the case here as EU law clearly had authority in national territories over certain fields of activity. Instead, resort was had to the idea that the distinctive identity of different political communities relies on some idea of human existence to describe and sustain their terms and foundations in a way that allows them both to be recognisable to and distinguishable from other political communities.³⁷ Charles Taylor has observed that with the onset of modernity, this idea of existence became vested in ‘[...] a picture of human order

³⁰ *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372, para 9.

³¹ *Ibid.*, para 21.

³² *IHT v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540, para 19.

³³ *Ibid.*, para 22.

³⁴ Now Article 52 TFEU.

³⁵ *Cohn-Bendit v Ministre de l’Intérieur* [1980] 1 CMLR 543.

³⁶ http://www.toupie.org/Dictionnaire/Ordre_public.htm, <accessed 10 February 2013>

³⁷ P. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (2011, Columbia University Press) 39-45.

[...] which sees us as historical agents, bodies in a material world, which move towards modes of common life in which our individuality is respected'.³⁸

This idea of a human order has been encapsulated in a number of terms: people, nation, public or society. In all cases, it is used to justify the unity and authority of the domestic political system. Its normative qualities, thus, enable law-making and the exercise of institutional power,³⁹ but also act as a constraint insofar as institutions must be guided by these qualities and not violate them. Beyond this, the human order also grants the political system an identity. It sets out a representation of a way of life which that political community is deemed to have inherited and whose mission it is to act out. This way of life, moreover, is something that the political community can never transcend but can only develop insofar as it goes to what that community is and what it holds sacred.

The vesting of sovereignty in this human order emphasised its centrality to the organisation and identity of domestic political life. It also set it out as something to be protected. However, most fundamentally, it set out the contours and qualities of this human order. As a sovereign, it inherited the qualities and shape of the metaphor of its predecessor, which had performed an analogous role: that of the King's Bodies.⁴⁰ This led to this human order, and modern ideas of political community having four dimensions, in particular.

It is *organological*. Its elements can be only properly understood in the light of their relationship to the whole.⁴¹ It had *temporal persistence*, so that it was granted an eternal, secular, political life.⁴² It was to be granted *dignity and acclaim* in that its qualities were to be seen as both singular to it and as sufficiently special in their own right to be worth of lionisation.⁴³ It represented a *lived experience* through laying down its own history, traditions and myths.⁴⁴

Lastly, as a sovereign, this human order marks itself out from government in two important regards. First, it sets out a different form of association. Individuals form part of this order merely by virtue of their co-presence. Their simple being is sufficient to generate ties between them and other members of this order. Government, by contrast, is dedicated to establishing associative ties for common purposes. Individuals are recognised insofar as they relate to this common purpose or activity and to others participating in such a venture.

The second difference goes to the quality of power enjoyed and exercised. The sovereign possesses a power to reign or, in modern parlance, to rule. This is

³⁸ C. Taylor, *A Secular Age* (2007, Harvard University Press) 279.

³⁹ M. Loughlin, *supra* n. 13, 184-189.

⁴⁰ In the Middle Ages, the sovereign was the King's Bodies: the physiological body of the monarch and the body politic, comprising the totality of the subjects, social relations, institutions, and moral ends of a political system. If the former allowed a particular individual to rule, the latter enabled continuity of rule, and marked out the qualities and contours of the political community. E. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (1997, Princeton University, NJ) 207 etseq.

⁴¹ E. Kantorowicz, *supra* n. 40, 199-203.

⁴² E. Santner, *supra* n. 27, 41.

⁴³ E. Kantorowicz, *supra* n. 40, 383-385; G. Agamben, *supra* n. 23, 167 etseq.

⁴⁴ P. Kahn, *supra* n. 37, 26.

an absolute and transcendental power. It contrasts with ordered power, which is the power necessary to execute the objectives of those holding authority.⁴⁵ Law, as the institutional expression of sovereign command, has come to occupy this place of reign. This is most vividly expressed in the idea of the rule of law, which sees law, *in toto*, as something which can extend itself to rule anything it wishes. This raises a curiosity about EU law. If the Treaties claim that the rule of law is a value on which the Union is founded,⁴⁶ there has never been a claim to a *rule of EU law* over anybody other than the EU Institutions.⁴⁷ If EU law rules over these, it is only granted attributes to enable it to have sufficient ordering force over discrete spheres of activities: autonomy, effectiveness, and the fidelity principle in Article 4(3) TEU which requires EU Institutions and member States to secure the tasks which flow from the Treaties.

(ii) THE FORMALISATION AND RING-FENCING OF THE HUMAN ORDER

The deployment of this tradition of sovereignty to mark out a space reserved from EU law led to its formalisation. If, previously this human order had stood for a symbolic order, a way for individuals to understand how things are done and their place in the world,⁴⁸ it was now associated with boundary-marking between EU and national law and differentiation and categorisation of different fields of activity.

The Organological Qualities of Social Policy and Criminal Justice: Domestic laws encapsulating a vision of the national society as a collective, indivisible body which generates mutual commitments between citizens are protected from EU law.⁴⁹ Social laws are one example with the grounds for entitlements typically fused together, so that citizens acquire these partly by reason of their membership of the body politic, partly by reason of their human needs and partly by ideas of what society, as a body, can sustain.⁵⁰ A similar logic is applied to criminal law which can be represented as, on the one hand, a series of mutual commitments between individuals and the body politic need to harm one another, and, on the other, a series of common ties binding citizens together as a body oriented around common ideas of harm. This leads not just to an aversion to EU law governing significant aspects of criminal law⁵¹ but also to certain elements of criminal law –

⁴⁵ Agamben locates this division in theological roots. Sovereign power is a divine power vested in the King and the Kingdom. The origins of governmental power are vested in angels whose role is to praise the sovereign, contemplate, act as role models for subject and administer the affairs of the kingdom. G. Agamben, *supra* n. 23, 68-82 and 144-160.

⁴⁶ Article 2(1) TEU.

⁴⁷ Most recently see C-336/09P *Poland v Commission*, Judgment of 26 June 2012, para 36.

⁴⁸ E. Santner *supra* n. 29, 2-32.

⁴⁹ On mechanical solidarity, see E. Durkheim, *The Division of Labour in Society* (1984, Macmillan, transl. L. Coser, London) Chapters II and III.

⁵⁰ *Admenta et al v Federfarma et al* [2006] 2 CMLR 47 (Italy); *Pl ÚS 5/12 Slovak Pensions*, Judgment of 31 January 2012 of Czech Constitutional Court.

⁵¹ *Re Ratification of Lisbon Treaty*, *supra* n. 20; *Assange v Swedish Prosecution Authority* [2012] 2 AC 471 (United Kingdom Supreme Court); *Re Enforcement of a European Arrest Warrant against Tzouannos* (Greek Court of Appeal) [2008] 2 CMLR 38.

notably the idea that other States should try a State's own citizens – being seen as elements of citizenship which should not be disrupted excessively by EU law.⁵² The organological metaphor brings out a further element to the relationship between EU and national law. As the body has some resilience, harm to the parts does not necessarily mean that the integrity of the body is being challenged. Problems are only generated where *significant* parts of social, criminal or citizenship law are governed by EU law. It is only where the intrusion is sufficiently meaningful – be it in terms of the range of activities or resources involved or their resonance – that the integrity of the body politic is placed in doubt.⁵³

Temporal Persistence and Fundamental Rights: The idea of temporal persistence has been identified most strongly with fundamental rights laws. These are presented as a series of values around which strangers can constellate.⁵⁴ These impersonal qualities can be presented as something eternal, connecting the past and the present, and as something universal, stretching across space. Fundamental rights are presented, therefore, as something which does not belong to a particular territory but a European heritage shared by the Union and member States which are universal in nature.⁵⁵ These qualities, in turn, allow them to be seen as something which form not just part of the national body politic but can carry over into EU law.⁵⁶ However, this occurs only symbolically. It is predominantly the ideational elements which carry over, namely the important idea that the Union observes EU law. A host of national legal systems have emphasised that fundamental rights go in an axiomatic way to the stability, meaning and worth of their particular political community.⁵⁷ This bond is not to be disrupted by EU law. Insofar as EU law touches on controversial debates about conflicts between fundamental rights or about the limits of these rights, the Court of Justice is quick to say that the question of whether a breach has occurred, is one for the national judicial system not it.⁵⁸ It is manifested, in like vein, in the territoriality of national constitutional courts over the interpretation of fundamental rights with very few

⁵² *Re Enforcement of a European Arrest Warrant* (Polish Constitutional Tribunal) [2006] 1 CMLR 36; *Re Constitutionality of Framework Decision on the European Arrest Warrant* (Czech Constitutional Court) [2007] 3 CMLR 24; *Cyprus v Konstantinou* [2007] 3 CMLR 42.

⁵³ A variety of formulations are used. These includes matters 'inherent' to national sovereignty *Re Ratification of the Lisbon Treaty* (French Constitutional Council) [2010] 2 CMLR 26, paras 7-9; 'material; core' *Re Czech Sugar Quotas* [2006] 3 CMLR 15, paras 109-110; 'sufficient space [...] for the political formation of the economic, cultural and social living conditions' *Re Ratification of the Lisbon Treaty* (German Federal Court) *supra* n. 20, para 249.

⁵⁴ M. Sandel, *Liberalism and the Limits of Justice* (1982, CUP) 143 etseq.

⁵⁵ Preamble to the TEU, alinea 2.

⁵⁶ Article 6(1) TEU.

⁵⁷ In addition to the cases mentioned see, *inter alia*, *Ratification of the Lisbon Treaty* [2010] 1 CMLR 42; *Decision 17/04 regarding Agricultural Surpluses*, Judgment of Hungarian Constitutional Court of 25 May 2004; Pl. ÚS 50/04 *Sugar Quotas III*, Judgment of 3 March 2008 (Czech Constitutional Court); K 32/09 *Lisbon Treaty*, Judgment of 24 November 2010 (Polish Constitutional Tribunal).

⁵⁸ In the case of EU instruments, the administration of these is seen as a matter for national authorities and therefore to be resolved by national courts, Case C-540/03 *Parliament v Council* [2006] ECR I-5769. Similarly, it is national courts which have to rule whether a national measure which falls within the field of EU law violates fundamental rights, Case C-260/89 *ERT v DEP* [1991] ECR I-2925.

references being made to the Court of Justice on the interpretation of these. National settlements have also been fiercely protective of rights which are regarded as fundamental within their constitutions but which do not carry that pedigree across the rest of the European Union.⁵⁹

The Dignity and Singularity of Territory, Citizenship and Political Authority: The dignity and singularity of the King's Bodies lay, in part, in their being seen as bringing the political system into being and enabling it to persist. In the modern day, dignity and singularity is granted to those elements of the State seen as necessary for uniting territory, subjects and government into a unitary conception of political life and which enable the political system to retain its autonomy and authority (its dignity) vis-à-vis other spheres of life.⁶⁰ Territory, the social contract, and the authority of public office are seen as giving rise not simply to the State but to the presence of the public qualities of political life. As a consequence, the monopoly of State authority over these is recognised.

With regard to territory, EU law does not affect national competences to demarcate borders.⁶¹ This vision also extends to States retaining control over central elements of foreign policy, insofar as these, like territory, mark out political identity within international society.⁶² Further, the social contract between State and citizen is viewed through the prism of the nationality relationship.⁶³ Described as a bond creating a 'special relationship of solidarity and good faith',⁶⁴ the establishment and termination of this relationship is a matter for national law.⁶⁵ The reciprocal entitlements and responsibilities seen as going to its special qualities are also protected from the full force of EU law. These include the right to be tried by one's own State,⁶⁶ rights to vote and stand in national elections,⁶⁷ right to hold high public office,⁶⁸ and duties to pay taxes.⁶⁹ Finally, those qualities of

⁵⁹ Protocol on Article 40.3.3 of the Constitution of Ireland; Protocol No.7 Act of Accession of Malta to the European Union 2003; Declaration 61 to the Treaty of Lisbon by the Republic of Poland on the Charter of Fundamental Rights of the European Union.

⁶⁰ M. Loughlin, *supra* n. 13, 186-196.

⁶¹ Article 77(4) TFEU; Protocol On External Relations of The Member States with Regard To The Crossing Of External Borders; Case C-16/05 *R v Secretary of State for the Home Department ex parte Tum & Dar* [2007] ECR I-7415.

⁶² Protocol on the Position of Denmark, article 5; Protocol on the Concerns of the Irish People on the Treaty of Lisbon, article 3.

⁶³ On how migration and naturalisation problematise this most notably in relation to electoral rights see J. Shaw, 'Sovereignty at the Boundaries of the Polity' in N. Walker (ed) *Sovereignty in Transition* (2003, Hart).

⁶⁴ Case C-1135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-1449, para 51.

⁶⁵ *Ibid.*, and the case law cited. The hypothetical possibility is held out that Member States cannot extinguish nationality in such a way that it violates EU law but this will not be the case where these qualities are not considered present in the relationship (i.e. nationality acquired by dishonesty or, one assumes, insufficient connection to the State of nationality).

⁶⁶ See the case law in n. 60.

⁶⁷ These rights are excluded from EU citizenship rights in Articles 20 and 22 TFEU. To be sure, some States' constitutions saw municipal electoral rights are part of this prior to Maastricht *Re Treaty on European Union* (Decision 92-308) JORF 1992, No 5354; *Re Treaty on European Union* (Spanish Constitutional Court) 1994 3 CMLR 101.

⁶⁸ Member States may reserve these for their own nationals by virtue of Article 45(4) and 51 TFEU.

public office or the public space which are seen as granting it a public and distinctive status are protected: be these the secular qualities of the French State⁷⁰ or those entitlements granted particularly to Heads of State.⁷¹

The Human Order as a Lived Experience: There is concern to emphasise that the order underpinning the State system is a human one rather than a moral one. In *Brunner*, for example, the German Constitutional Court talks of the protection of a 'living democracy' in Member States.⁷² There is concern to ring-fence structures which relate ideas of the good and the right with the lives a particular society: be these charities, educational or religious institutions.⁷³ Similar treatment is accorded to the home. There is much EU law preventing national laws or practices disrupting family or private law. However, it governs far less certainly those experiences which go to the make-up of this private life. The right to marriage or to found a family are to be determined in accordance with national law.⁷⁴ There is no right to housing within EU law.⁷⁵ Likewise, various States have insisted on Protocols or Declarations to protect their understandings of family life.⁷⁶

(iii) THE DANGERS OF HAVING AND NOT HAVING A DOMESTIC HUMAN ORDER

This tradition of sovereignty emphasises that government power should be constrained. This constraint requires governmental authority to be justified by reference to those qualities we associate with authority figures: capacity, expertise, wisdom and fairness. Sovereignty also acts to restrain those pathological features of government which see life too much through a monocular prism of realising a common purpose or ideal state. It emphasises the presence and value of other types of community and tie, and that space must be found for these. However, this tradition of sovereignty has a dark side. Excessive sanctity granted to this human order allows its conservatism not only to be unchallenged but transgression not to be tolerated, as its sanctification requires that it be given effect over everything else. It becomes quickly a fascistic artefact.⁷⁷

⁶⁹ To be sure, all fiscal residents are subject to liability to pay tax. However, only nationals can be prevented from leaving the territory on these grounds. Case C-434/10 *Aladzhov*, Judgment of 17 November 2011. Similar reasoning would no doubt apply to jury or conscription duties.

⁷⁰ *Re European Union Constitutional Treaty and the French Constitution* [2005] 1 CMLR 750.

⁷¹ Case C-364/10 *Hungary v Slovak Republic*, Judgment of 16 October 2012, para 35.

⁷² *Brunner v TEU* [1994] 1 CMLR 57, para 107.

⁷³ Protocol on the concerns of the Irish people on the Treaty of Lisbon 2011, article 1.

⁷⁴ Article 9 EUCFR.

⁷⁵ There is talk merely of the right to housing assistance, Article 34(3) EUCFR.

⁷⁶ Protocol on the concerns of the Irish people on the Treaty of Lisbon 2011, article 1; Declaration 61 to the Lisbon Treaty by Poland on the European Union Charter of Fundamental Rights.

⁷⁷ On how this happens within the work of Carl Schmitt see H. Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' 9, 21-24 in M. Loughlin and N. Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2006, OUP).

Elements of this have emerged within the EU debate. Insofar as sovereignty has been deployed in this way, it has been used for a very practical task, namely to protect domestic activities from EU intrusion. This has led to this idea of human order becoming too formalised. It has become associated with a particular set of activities with little regard to how central these activities are to making us who we are. A bigger problem, however, is the dichotomisation which takes place. If any activity falls within this ring-fenced field belonging to the sovereign (i.e. social policy, criminal law, fundamental rights, etc.) it is not to be significantly troubled by EU law. This stops EU law realising its potential as a vehicle for political communities to re-imagine themselves. There is a whole tradition associating EU law with providing a vehicle for giving under-represented interests voice or enabling us to transcend what we have at the present or to recognise more fully the singularity of others.⁷⁸ This is not realisable if those activities perceived as most central to collective identity formation are insulated from this purview. As a consequence, this vision of sovereignty often also has a peculiar impoverished vision of domestic political community.

However, dangers are also evident in those States who have not followed this tradition. This occurs in those States which allow international treaties to limit their sovereignty but place no counter-check on the international treaty. EU law thereby takes precedence over all national law including the constitution.⁷⁹ This leads to weak restraints on EU government. It is allowed to go wherever EU law's purposes lead it and to have as much as force as is necessary to realise these purposes.

States following this path have therefore adopted a variety of routes to counter this. In Ireland for example, this authorisation of power by the external sovereign is taken to be something only the people and not the government can do.⁸⁰ All treaty amendments have, thus, been subject to referendums and all EU treaty amendments have been characterised by a series of exceptions to protect the Irish vision of this tradition of sovereignty.⁸¹ Another approach has been to fret about the quality of governmental process offered by the Union. Dutch courts, for example, have refused to follow Court of Justice rulings where they believe it oversteps the proper role of a court.⁸² Likewise, Austrian courts have emphasised

⁷⁸ J. Weiler, 'To be a European Citizen – Eros and Civilization' (1997) 4 *JEPP* 495; J. Kristeva, *The Crisis of the European Subject* (2000, Other Press) Chapter 3. R. Gasché, *Europe, or the Infinite Task: A Study of a Philosophical Concept* (2009, Stanford University Press) 342. U. Beck and Lagrande, *Cosmopolitan Europe* (2007, Polity) 6-9 and 225-240.

⁷⁹ *Connect Austria*, VfSlg 15.427/1999 (Austria); *Minister for Economic Affairs v Fromagerie Franco-Suisse 'Le Ski'* [1972] CMLR 330, *Orfinger v Belgium* [2000] 1 CMLR 612 (Belgium); Articles 91-93 of the Constitution of the Kingdom of the Netherlands 2002.

⁸⁰ *Crotty v An Taoiseach* [1987] IR 713, para 62, page Walsh J.

⁸¹ Protocol on Article 40.3.3 of the Irish Constitution (Maastricht, abortion); Protocol on the position of the United Kingdom and Ireland (Amsterdam); Declaration by the Seville European Council on the National Declaration of Ireland (Nice concerning defence) 13463/02; Protocol on the Concerns of the Irish People on the Treaty of Lisbon.

⁸² S. Garben, 'Sky-High Controversy and High-Flying Claims? The *Sturgeon* Case law in the light of Judicial Activism. Euroscepticism and Eurolegalism' (2013) 50 *Common Market Law Review* 15, 30-33.

the importance of fundamental rights as a check on EU government.⁸³ With these latter approaches, if there is not to be a continual second-guessing of EU processes and controls, a considerable deference has still, however, to be granted to the Union. Furthermore, nothing is in place to counter the expansion of government. It can dominate, under this ethos, all forms of activity and way of life, and there would be nothing unproblematic to this.

IV. SOVEREIGNTY AS ORDAINMENT

(i) THE EUROPEAN MULTIPLICATION OF ORDAINMENT

The tradition of sovereignty as ordainment is traceable back to William of Ockham, who, noting that God and Christ did not involve themselves with daily rule, observed that ordainment took place of those, the Church, who were to do this in their name.⁸⁴ This was replicated in the distinction between the sovereign power of the King and those who administered on his behalf. As monarchy disappeared with modernity, this became a simple distinction between sovereign and government. If the sovereign was general and transcendent and government derived and concrete each relied on the other for its coming into being. Without the presence of government, sovereign power could not be realised in daily life. Conversely, government relied for its authority on some blessing by the sovereign.⁸⁵ The presence of a single providential order required that the sovereign had a power of ordainment which linked and coordinated the two.

The onset of EU law led once again to a formalisation of this tradition. The sovereign, be it the Member States or some other being or institution, became something which had put the Union into being. It had authorised the Union and, thereby, bequeathed it with authority. As a consequence, the Union enjoyed a fiduciary relationship with regard to it. It was to act on its behalf. It was not to abuse that trust by exceeding anticipated limits on what it can do or acting in an abusive or procedurally improper way. In this way, sovereignty becomes a watchdog over EU governmental activity.

This tradition emerged, first, in the *Matter* doctrine: the French approach to the authority of EU law prior to 1975. Under this doctrine, as treaty law, EU law was authorised by the French parliament to apply within France. In cases of

For similar debates in Belgium see M. Melchior and P. Vandernoot, 'Contrôle de Constitutionnalité et Droit Communautaire Dérivé' (1997) *Revue Belge de Droit Constitutionnel* 3.

⁸³ 'Constitutional Court has reservations against data retention and turns to the CJEU' *Press Release of the Austrian Constitutional Court of 18 December 2012*.

⁸⁴ F. Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (2007, Eburon) 151-153; J. Eshtain *Sovereignty: God, State and Self* (2008, Basic Books) 33-40.

⁸⁵ G. Agamben, *supra* n. 23, 109-143.

conflict with subsequent French laws, French courts were to reconcile differences by interpreting EU law and the French statute to be mutually compatible wherever possible.⁸⁶ If this were not possible, the French statute was to prevail. Formally, this was because it occupied a hierarchically superior position to EU law.⁸⁷ Ideationally, however, this was because the French statute was seen as expressing a general will (*volonté générale*) which should have precedence over laws without these qualities, and were therefore transgressing the leeway granted to them by this general will.

Brunner, the decision of the German Constitutional Court reviewing the constitutionality of the Maastricht Treaty, marked a step change in this reasoning. Sovereignty is not vested in the State or in an institution, but in the human order which is being ruled, and is now granted the power to authorise government.⁸⁸ This was followed through, and made more explicit in the subsequent *Lisbon Treaty* judgment of the German Court where it stated 'sovereign statehood stands for a pacified area and the order guaranteed therein on the basis of individual freedom and collective self-determination'.⁸⁹ A doctrine of democratic sovereignty was, thereby, introduced into the EU debate with a sovereign human order both authorising governmental power and holding it accountable.⁹⁰

This begs the question as the nature of the human order which can be deployed to authorise government and hold it to account. *Brunner* sets out one as a people with its own independent metaphysical presence which exists in some way prior to the presence of any political settlement. The presence of this people is, in turn, a precondition for the presence of democracy (the *No Demos* thesis). This was rightly eviscerated on the grounds of its ethno-centric bias.⁹¹ However, others have observed that this human order could have other traits. It could simply be all those affected or anticipated to be affected by a rule. In this manner, it could become a transnational or global constituency which gives rise to transnational or cosmopolitan rule.⁹² Democratic sovereignty, under this vision, allows for a dissipation of institutional power and political community away from the State. De-anchored from Statehood or particular institutions, the sovereign can divide itself and multiply. The power of ordainment now acquires an active jurisgenerative capacity to authorise and put in play new patterns of rule, which it did not have previously.

⁸⁶ For a similar approach in the United Kingdom see; *Macarthys v Smith* [1981] 1 QB 180.

⁸⁷ On the *Matter* doctrine see J. Plötnner, 'Report on France' 41, 44-46 in A-M Slaughter et al (eds) *European Courts and National Courts: Doctrine and Jurisprudence* (1998, Hart.)

⁸⁸ *Brunner v TEU* [1994] 1 CMLR 57, paras 35 and 40.

⁸⁹ *Re Ratification of the Lisbon Treaty*, supra n. 20, para 224.

⁹⁰ On this debate in Germany by an exponent see A. v. Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law' (2004) 15 *European Journal of International Law* 885, 887-888 and 901-902.

⁹¹ J. Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 1 *European Law Journal* 219, 224-231.

⁹² S. Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty' (2009) 103 *AJPS* 691, J. Habermas, *The Crisis of the European Union: A Response* (2012, Polity) 42 etseq.

Less frequently observed is the effect of *Brunner* on sovereignty's ordaining powers over government. Historically, this ordainment emphasises government's contingency and insufficiency.⁹³ Sovereign power is set out as something conferring, indivisible and transcendental whilst governmental power is characterised as derived, discrete and material. *Brunner* recasts this, by allowing the sovereign to authorise not just government but also the transfer of sovereignty.⁹⁴ It was thus, stated that Member States established the Union to exercise part of their '[government] function in common and to that extent to exercise their sovereignty in common.'⁹⁵ The distinction between the ordaining sovereign and the ordained government is therefore put in doubt.

This doubt was reflected in the establishment of the *Kompetenz-Kompetenz* which had to establish a relationship between the ordaining and ordained sovereign. This recreated the distinction between sovereignty and government, albeit with the national sovereign taking the role of the former and the European sovereign the latter. All traditions involved, thus, found national sovereignty had an original and ordaining quality which European sovereignty did not possess. The establishment of this role required the national sovereign to become actively engaged in the business of government through patrolling the democratic quality of EU government. This brief for national sovereignty was to reduce it to a form of administrative law.

(ii) SOVEREIGNTY AS EUROPEAN ADMINISTRATIVE LAW

This administrative law function involved a number of patrolling elements. The first goes to the limit of Union powers. The Union is to operate under a doctrine of limited powers and only have powers whose ambit is 'sufficiently foreseeable'.⁹⁶ This applies not just to the Union as a whole but also to particular institutions. EU Institutions are not to exceed their anticipated brief or adopt a measure not seen as in keeping with their institutional function. The most notable example, *Slovak Pensions*, concerned a refusal by the Czech Constitutional Court to follow a Court of Justice judgment which declared that a scheme compensating Czech citizens who received lower Slovak pensions under the agreement dissolving Czechoslovakia illegal insofar as these benefits were only granted to Czechs resident in the Czech Republic, and therefore discriminated against other EU citizens. The Czech Court stated that the Court of Justice had acted ultra vires insofar as it failed to account for the complexity of arrangements dealing with

⁹³ H. Lindahl, 'Sovereignty and Representation in the European Union' in N. Walker (ed) *Sovereignty in Transition* (2003, Hart).

⁹⁴ This idea of sovereignty being transferred to the Union has been followed in Slovenia (article 3a Constitution); Latvia (*Ratification of the Lisbon Treaty* [2010] 1 CMLR 42, para 210) and the Czech Republic (Pl ÚS 19/08 *Lisbon Treaty I*, Judgment of 26 November 2008, para 105).

⁹⁵ *Brunner v TEU* supra n. 88, para 52.

⁹⁶ *Brunner v TEU*, supra n. 88, para 33; *Re Ratification of the Lisbon Treaty* (Germany), supra n. 20, para 322.

State dissolution or their centrality to Czech history by treating it simply in terms of free movement of EU citizens.⁹⁷

The second field of concern is to the quality of policy-making. In *European Stability Mechanism Treaty* the Estonian Supreme Court found that the treaty compromised Estonian financial sovereignty by allowing significant financial assistance from euro area States, including Estonia, to be granted in emergencies by Qualified Majority to States with financing difficulties.⁹⁸ It held that the measure would be lawful if it was for legitimate purposes and proportionate. It considered the stability of the euro area to be such a purpose, but then considered whether the instrument was proportionate. It looked, first, at whether the measure was appropriate. For this it looked at how the Mechanism balanced efficient decision-making with protecting Estonian influence. It then looked at whether the measure was reasonable by assessing the size of the Estonian contribution.

The third element is securing institutional oversight. The institutions necessary to secure democratic control vary according to national preferences. The German Constitutional Court has argued that increasingly intrusive measures require greater involvement by the European Parliament.⁹⁹ The Danish and Estonian Courts argue, by contrast, that involvement and effective influence of the national government in the Council is necessary to protect national sovereignty.¹⁰⁰ In *Slovak Pensions*, a feature in the Czech Constitutional Court's decision that the Court of Justice had acted illegally was the failure by the latter to allow the Czech court to submit an amicus curiae brief outlining the consequences for the Czech legal system. It considered the lack of domestic judicial involvement a failure of due process. If the institutions vary, however, their role is invariably cast as a prudential one in which they review or advise EU government in order to block or limit its adverse effects.

The final ground for patrol is respect for fundamental rights. It has already been mentioned that fundamental rights are characterised as forming part of the national human order which is to be protected from EU law. This protection extends not merely to resistance to an EU fundamental rights law which would submerge national fundamental rights law but to transgressions of national fundamental rights by EU Institutions or EU law. This, combined with arguments of democratic control, pushed for a national sovereign who ensured that EU government did not violate fundamental rights.¹⁰¹ A number of national courts –

⁹⁷ Pl. ÚS 5/12 *Slovak Pensions*, Judgment of 31 January 2012. The Court of Justice judgment is Case C-399/09 *Landtová*, Judgment of 22 June 2011. For further analysis see J. Komárek, 'Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *ultra vires*.' (2012) 8 *European Constitutional Law Review* 323.

⁹⁸ Case 3-4-1-6-12 *Request of the Chancellor of Justice to declare Article 4(4) of the Treaty establishing the European Stability Mechanism in conflict with the Constitution*, Judgment of 12 July 2012.

⁹⁹ *Brunner v TEU*, supra n. 88, para 40.

¹⁰⁰ *Carlsen v Rasmussen* [1999] 3 CMLR 854, para 9.9; Case 3-4-1-6-12, supra n. 98, para 184.

¹⁰¹ As a consequence, within the Union there is not really an EU human rights policy. Focus is instead on EU Institutions and implementing national measures, as an extension of this government, not violating fundamental rights. This is in stark contrast to EU external policies which pursue very active human rights agendas. A. Williams, *EU Human Rights Policies: A Study in Irony* (2004, OUP) Chapter 4.

German, Italian, Hungarian, Czech, Polish, Latvian and Estonian- have, thus, made EU observance of fundamental rights a precondition for the authority of EU law.¹⁰²

(iii) SOVEREIGNTY AS DEMOCRATIC ACCLAIM FOR EU GOVERNMENT

EU law acceded to the demands that democratic controls be placed over EU government by replicating these controls within its structures. As a ground of review, fundamental rights were incorporated into EU law, and then granted the same formal status as the TEU.¹⁰³ There was similarly a commitment to conferred powers and to EU Institutions observing the proportionality principle.¹⁰⁴ And, finally, over time, mimicking national models, parliamentary involvement increased in both EU law-making and over review of EU administrative activities.¹⁰⁵ It is unclear how rigorous these are as controls. There is only one instance of any provision of a Directive being struck down because it violates fundamental rights¹⁰⁶ and only one clear instance of EU Institutions having exceeded the doctrine of conferred powers.¹⁰⁷ The proportionality principle, similarly, grants considerably latitude to the EU legislature which will only be found to have violated the principle where the legislation is ‘manifestly inappropriate’.¹⁰⁸ Finally, whilst national parliamentary input within EU decision-making has increased, it is confined to consultation by the Commission and to policing the subsidiarity principle.¹⁰⁹

This begs the question as to why national sovereignty has not been asserted more aggressively to limit EU government. Agamben has argued that sovereign controls of this ilk are, in reality, a form of acclaim: something on which government has always relied.¹¹⁰ This acclaim has a ceremonial function of legitimating government by granting it a certain glory. In modern times, government becomes through this something sanctioned by the public as democratic. This acclaim struggles, however, to limit or control government.

All this raises the question as to whether the autonomy of EU law sets out conditions where it is all but impossible for sovereign controls to do anything but

¹⁰² The references in ns. 36, 38 and 65.

¹⁰³ Article 6(1) TEU.

¹⁰⁴ Article 5(1) TEU.

¹⁰⁵ On how these paralleled each other as legitimating strategies see B. Rittberger, *Building Europe's Parliament: Democratic Representation beyond the Nation State* (2005, OUP), especially Chapter 6.

¹⁰⁶ Case C-236/09 *Association Belge des Consommateurs Test-Achats v Conseil des Ministres*, Judgment of 1 March 2011.

¹⁰⁷ Case C-355/10 *Parliament v Council and Commission*, Judgment of 5 September 2012. The European Union's proposal to accede to the ECHR was also found to exceed its powers but it was just a draft at that stage, Opinion 2/94 *Re Accession to the ECHR* [1996] ECR I-1759.

¹⁰⁸ I.e. Case C-309/10 *Agrana Zucker v Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft*, Judgment of 28 July 2011; Case C-59/11 *Association Kapokelli v Baumanx*, Judgment of 12 July 2012.

¹⁰⁹ Eg Article 12(a) and (b) TEU.

¹¹⁰ G. Agamben, *The Kingdom and the Glory*, supra n. 23, especially 194-196 and 253-259.

sanctify EU government. As a tool of government, EU law claims to realise three benefits which, in turn, allow it a freedom from sovereign controls. The first is the provision of collective goods. The second benefit is that (EU) law establishes associative ties between people who would otherwise be strangers. Finally, (EU) law enables social ordering by setting clear parameters about permissible behaviour. This allows parties to realise things for themselves by planning their lives with a certain degree of certainty and idea of what is possible.¹¹¹

These benefits make it very difficult to disapply an established EU law. Even if parties object to the way in which it secures one of these benefits (i.e. the goods it pursues) there is still the problem about what to do with the other two elements. Suspending a disliked law generates problems about what to do with the relationships that have settled around it and raises issues of legal uncertainty. Furthermore, this creates as much uncertainty for domestic law as for EU law as it is unclear when the latter is to prevail over EU law and when not. In terms of associative ties, it can destabilise trust by piercing a regulatory reality which has established self-perceptions and perceptions about other parties. Finally, it can undermine law's claim to authoritative settlement. Many might claim that EU law is morally bankrupt, but, without some substitute vision to replace the space left by EU law, it is a claim that no law is better than this law.

These arguments exert a powerful pull where there is any settled EU law as they go to the power of law as an institution of government. One sees this where there is a settled EU law in practice no equivalent substitute domestic law that can be introduced relatively seamlessly. This is best shown by a comparison of *ex ante* adjudication by national courts which looks at EU laws not yet in force and *ex post* adjudication where national courts are called on to disapply EU laws. *Ex ante* regulation typically occurs on a State's accession to the Union, consideration of Treaty amendments or international treaties related to the integration process, such that on the European Stability Mechanism. In the event, a host of *ex ante* judgments condition the authority of EU law.¹¹² To be sure, courts are induced to address this question at such a moment. However, they could choose just to repeat prior jurisprudence. That they do not is testament to both their having a particular freedom at such moment and to the concerns raised by EU law.

The approach with *ex post* judgments is very different. The overwhelming majority accept the authority of EU law. Opposition, when expressed, is formulated in a subversive form so as not to challenge the authority of EU law directly. A variety of techniques are deployed to present challenges as sporadic and ad hoc rather than as going to basis for the authority of EU law. These include targeting implementing domestic legislation rather than the EU law itself;¹¹³

¹¹¹ On law as a planning tool see S. Shapiro, *Legality* (2011, Harvard University Press) especially Chapters 6-7.

¹¹² I.e. *Treaty of Lisbon* (Germany) [2010] 3 CMLR 13; *Re Lisbon Treaty* (Latvia) [2010] CMLR 24; K 32/09, *Treaty of Lisbon*, Judgment of 24 November 2010 (Poland); *Re Ratification of the Lisbon Treaty* (France) [2010] 2 CMLR 26.

¹¹³ *Constitutionality of German Law Implementing the Framework Decision on a European Arrest Warrant* [2006] 1 CLMR 16.

deciding the matter under national law rather than EU law;¹¹⁴ narrow interpretation of EU legal norms;¹¹⁵ or referring the matter back to the domestic political process to sort out the difficulties wherever legal consonance is not possible.¹¹⁶ When there are explicit disapplications, moreover, it is telling that they always relate to either a well-established national law¹¹⁷ or to targeting an administrative measure.¹¹⁸

This difference is also apparent in the reasoning of constitutional courts. The Hungarian and Polish Constitutional Courts thus both gave judgments on or prior to accession suggesting both a sceptical posture to the claims of the Court of Justice and a disposition to give only limited authority to EU law.¹¹⁹ Confronted with an EU law already in force, they both took a far more deferential approach.¹²⁰ The most striking example, however, is that of German Constitutional Court with regard to the Lisbon Treaty. In its *Lisbon Treaty* judgment, prior to German ratification of the Lisbon Treaty, the Court was adamant about the doctrine of limited powers applying to the Union in such a way that the Union only have sufficiently precise powers.¹²¹ The Court would not just monitor this but also observance of the subsidiarity principle¹²² and that Union competencies were not developed with resort to any methods of interpretation beyond those of *effet utile* or implied powers.¹²³ However, a year later in *Honeywell*, a case right at the edge of Union powers,¹²⁴ the Court took a different approach, both substantively and procedurally. Substantively, it stated that it would not revise measures of the Union which were *ultra vires* but only measures where the exceeding of powers was drastic and obvious.¹²⁵ Even this would be insufficient to lead domestic review as this would threaten the uniformity and precedence of EU law. National judicial

¹¹⁴ *Attorney General v X* [1992] 2 CMLR 277; *Tzouannos* (Greek Court of Appeal) [2008] 2 CMLR 38; *Assange v Swedish Prosecution Authority* [2012] 2 AC 471 (United Kingdom Supreme Court).

¹¹⁵ E.g. The actions against the Corte de Cassazione and the Austrian Administrative Court in. Case C-12/00 *Commission v Italy* [2003] ECR I-4637; Case C-224/01 *Köbler v Republik Österreich* [2003] ECR I-10239. In like vein see *Attorney General of Cyprus v Konstantinou* [2007] 3 CMLR 24.

¹¹⁶ *Re Enforcement of a European Arrest Warrant* (Polish Constitutional Tribunal) [2006] 1 CMLR 36

¹¹⁷ *Re Value Added Tax Directives* [1982] 1 CMLR 427; *Admenta et al v Federfarma et al* [2006] 2 CMLR 47; Pl. ÚS 5/12 *Slovak Pensions*, Judgment of 31 January 2012.

¹¹⁸ *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540; *Cohn-Bendit* [1980] 1 CMLR 543.

¹¹⁹ *Decision 30/1998 invalidating Article 62 of the 1994 Europe Agreement*, Judgment of 25 June 1998; *Decision 17/04 regarding Agricultural Surpluses*, Judgment of 25 May 2004; *K 18/04 Polish Accession to the European Union*, Judgment of 11 May 2005.

¹²⁰ *K 3/08 Competence of every Polish Court to make a Preliminary Ruling*, Judgment of 18 February 2009; *Decision 143/2010. (VII. 14.) Constitutionality of the Act of promulgation of the Lisbon Treaty* (Hungarian Constitutional Court), Judgment of 12 July 2010 (The Lisbon Treaty was already in force when this was adopted).

¹²¹ *Re Ratification of Lisbon Treaty*, supra n. 20, para 236.

¹²² *Ibid.*, para 240.

¹²³ *Ibid.*, para 242.

¹²⁴ *Decision 2 BvR 2661/06 Honeywell*, Judgment of 6 July 2010. The case concerned whether Directives could generate obligations for private parties prior to the transposition date. The Federal Labour Court had considered that this exceeded Union powers.

¹²⁵ *Ibid.*, para 61.

control could only take place where the Court of Justice had first been given an opportunity to consider the matter itself and had failed to hold the measure invalid.¹²⁶

V. EUROPEAN SOVEREIGN GOVERNMENT

(i) THE FOLIES DE GRANDEUR OF EUROPEAN DEMOCRATIC SOVEREIGNTY

The dynamics of these two debates on sovereignty generated a third mode of thinking about sovereignty, that of European sovereign government. Within it, the human order, be it the people or the democratic order, is no longer seen as limiting government or rendering it contingent. Instead, government is now taken to be synonymous with the will of the sovereign. Institutions have to be aligned to reflect this, and to allow the sovereign to be actively involved with its discharge of government. There is said to be correspondingly less need for external controls on the range of governmental activities or on the manner in which they are exercised.

The idea of a European sovereign government was put most fully into play by the *Lisbon Treaty* judgment of the German Constitutional Court, which had to consider what political conditions would support a move to a European federal State. This, it was said, would not require a *Demos* but that Union powers enjoyed sufficient ‘democratic legitimation’.¹²⁷ A European federation could only occur where it was ‘fully consistent with the requirements for the democratic legitimation of a union of rule organised by a state’;¹²⁸ when EU legal and institutional structures ‘create an independent people’s sovereignty for all Union citizens’.¹²⁹ This would require the Union to have a ‘democratic core’ in which the ‘decision of the people is the focal point of the formation and retention of political power’. Legislative office must, in particular, be based on the presence of elections in which all citizens are treated as free and equals.¹³⁰

The Court then went on to consider the institutional conditions for when the Union could enjoy democratic sovereignty, and thus enjoy general powers of government. Democratic legitimation could not, it believed, be provided by any EU Institutions.¹³¹ Democratic legitimation could however be provided through the involvement of national parliaments in its decision-making as these possessed the mandate to be seen as democratic representatives of this human order.¹³²

¹²⁶ Supra n. 124, paras 58-60.

¹²⁷ Ibid., para 264.

¹²⁸ *Re Ratification of the Lisbon Treaty* supra n. 20, para 263.

¹²⁹ Ibid., para 281.

¹³⁰ Ibid., paras 270-271.

¹³¹ Ibid., paras 287 and 297.

¹³² These include the amendment procedures, passerelles and Article 352 TFEU. *Re Ratification of the Lisbon Treaty*, supra n. 24, paras 301-328. On the subsequent procedures put in place see D. Jancic,

The implications of this were spelt out by the Court in most detail in its *ESM Treaty (Temporary Injunction)*.¹³³ The judgment concerned a challenge to the treaty between the euro area States establishing the European Stability Mechanism (ESM),¹³⁴ which exposed States to unprecedented public expenditure liabilities and moved the Union much more aggressively into budgetary policy. Financial support could only be offered if States met certain conditions, typically balancing their public finances and economies. These conditions typically involve a mixture of privatisations, tax rises and public spending cuts. The ESM thus also moves European integration into the field of fiscal and welfare policy.

The Court indicated that decisions on public expenditure and revenue were a ‘fundamental part of the ability of a constitutional state to democratically shape itself.’¹³⁵ Significant budgetary decisions, such as the ESM Treaty, went in other words to a State’s sense of its democratic identity. They were so fundamental that they could not be seen as a limited power. However, what makes these measures more fundamental than measures in other fields? The idea of democratic self-shaping conveys the idea of a human order which needs to be able to rule certain activities to have a sufficient form to be whole. Taxation is one of these activities, insofar as it lies at the heart of the social contract which allows citizens to be represented not merely as a group of individuals but as a collective being (a people or public) and finances those policies, which are most intimately associated with the metaphor of the human order as a collective human being (i.e. social policy, foreign and defence, criminal justice).¹³⁶ For the German Constitutional Court, EU government was therefore to be extended to a field normally reserved for sovereign rule provided this government was controlled by the representative of this order, the German Bundestag. The Bundestag had, therefore, to retain control over all ‘fundamental budgetary decisions’.¹³⁷ Furthermore, in exercising this control, it must enjoy complete autonomy and be ‘free of other-directedness on the part of the bodies and of other Member States of the European Union and remain(s) permanently “the master of its decisions”’.¹³⁸

As a dominant arm of EU government, Bundestag involvement is to be gradated according to the perceived budgetary importance of the activity. In principle, its involvement, in particular its powers of financial approval and monitoring, must increase in proportion to the size of the financial liability or

‘Caveats from Karlsruhe and Lisbon: Whither Democracy after Lisbon?’ (2010) 16 *CJEL* 337. This requirement of domestic parliament approval has been followed in the United Kingdom, European Union Act 2011, section 8.

¹³³ Case 2 BvR 1390/12 et al *ESM Treaty Temporary Injunction*, Judgment of 12 September 2012.

¹³⁴ See J. Tomkin, ‘Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy’ (2013) 14 *German Law Journal* 169.

¹³⁵ *Supra* n. 133, para 194 (all references are English translation).

¹³⁶ See pp 11-12.

¹³⁷ *Ibid.*, para 195.

¹³⁸ *Ibid.*, para 197.

spending commitment.¹³⁹ In particular, the Bundestag must be able to approve every large scale aid measure. It must have sufficient influence over the manner in which the funds are spent. Finally, the Bundestag must be provided with sufficient information about the workings of the Mechanism to be able to assess the basis for and the consequences of any decision.¹⁴⁰

This reasoning abolishes the distinction between sovereignty and government so that they become one. The people, qua individual citizens, only become sovereign insofar as they govern through national parliaments. Government only enjoys authority insofar as it involves the sovereign. This joinder justifies EU government in areas previously protected from it, and subject to sovereign rule. As EU government now involves the sovereign, it has the power to rule all those fields which are traditionally ruled by the sovereign. The German Court therefore, talks of the strengthening of the position of national parliaments in EU structures to ‘use their (national parliaments’) reservoir of legitimation to benefit European processes’.¹⁴¹ Such a power is, moreover, subject only to the constraints of parliamentary assent and those which the EU places on itself. There is no need to impose external controls on EU government. Instead, as the sovereign is now seen as fully involved in the activity of government so that she is governing herself (or –selves),¹⁴² these external controls become otiose.

(ii) A SCHMITTIAN EUROPE?

The bringing together of sovereignty and government harks back to a darker tradition, the Schmittian one in which the sovereign both founds legal authority and governs it. For Schmitt, the central mission of any political order was to provide public safety and order. The sovereign was the body which could provide that order.¹⁴³ The mode of association was therefore not one of mutual recognition or of realising common projects. It was rather securing the interests of the political order and of ensuring no threat to stability. As a consequence, sovereignty was vested in the body or capacity best placed to secure this rather than in any broader justification. It lay in that body’s ability to produce and guarantee a state of affairs.¹⁴⁴ Now Article 3 of the ESM treaty states:

The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, [...] to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if

¹³⁹ Ibid., para 196.

¹⁴⁰ Ibid., paras 198-199.

¹⁴¹ Ibid., para 226.

¹⁴² M. Wendel ‘Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012’ (2013) 21 *German Law Journal* 21, 31-40.

¹⁴³ C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1985, transl C. Schwab, MIT) 6.

¹⁴⁴ Ibid., 13.

indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.

The ESM's mission is to safeguard euro area and national financial stability. The associative ties established by it are not concerned with securing mutual recognition of citizens or of realising common purposes. They are to secure order and the survival of the system: a European *raison d'état* in which the latter becomes not simply a value in itself but possibly the highest value. Other forms of associative tie are consequently downgraded relative to this mission. The rationale for the ESM lies, furthermore, in its power to secure this order and save the system: its capacity to harness the financial resources provided by national governments. This is reflected in the political structures of the ESM where voting weights are calibrated according to the financial contribution of the government.¹⁴⁵ The powers of the EU Institutions within this body are also, correspondingly, fluid and novel. The central decision-making body, the Board of Governors, comprises euro area finance ministers.¹⁴⁶ Its composition is identical to the Council of Ministers when it considers euro area matters of monetary policy, but it now exercises another function, namely to lend financial support and approve the terms of that support: set out in Memorandum of Understanding between the ESM and the State concerned.¹⁴⁷ If the Council has become a banker, the Commission and European Central Bank negotiate and supervise the conditions which have to be met by the debtor State.¹⁴⁸ This is a new task, in particular, for the European Central Bank. Its dominant task has, historically, been setting short-term interest rates. It is now negotiating and supervising welfare and fiscal reform. The reason for these new tasks, in all cases, is a belief in the capacity of the institution. It can realise the objectives set of it. Thus, the ECB and the Commission ask for assistance from the IMF in negotiating conditions and monitoring their implementation precisely because this will augment their capacity.¹⁴⁹

The second feature of the Schmittian sovereign is the power of decision. The sovereign decides what constitutes public order and security, and this power founds the political system.¹⁵⁰ As a foundational power, this decision precedes law, thereby giving a prior power to the administration. The power of decision operates within a qualified way within the ESM. The ESM and the government seeking support decide the measures necessary to restore stability, notably the level of

¹⁴⁵ Ibid., article 4(7). For criticism see M. Dawson and F. de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *Modern Law Review*, forthcoming.

¹⁴⁶ Ibid., article 5(1).

¹⁴⁷ Ibid., article 13(4). This is formally signed by the Commission, article 13(4).

¹⁴⁸ Ibid., article 13.

¹⁴⁹ Ibid., article 13(1)(a) and (7).

¹⁵⁰ C. Schmitt, *supra* n. 165, 8-9.

financial support and the conditions to be attached. These are set out in a Memorandum of Understanding rather than any law.

However, to what extent does this decision precede the law? The ESM has been characterised by the Court of Justice as an international agreement which exists independently of the EU Treaties. It can enjoy competencies beyond those set out in those Treaties. EU Institutions can be granted powers by it that not granted to them by the EU Treaties. Finally, as it operates beyond the aegis of EU law, the checks and balances and fundamental rights checks provided by EU law do not apply to the exercise of powers under the ESM.¹⁵¹ The only checks on institutional power, beyond the financial resources available to the ESM, are that it must obey the ESM Treaty, the substantive requirements of EU law, and powers granted to EU Institutions was not to alter the 'essential character' of the powers enjoyed under the Treaties.¹⁵² None of these checks are meaningful. The only substantive constraint imposed by the ESM Treaty on the Memorandum of Understanding which governs a debtor States fiscal and welfare policy is that it must reflect the 'severity of the weaknesses' addressed.¹⁵³ Similarly, as the funding arrangements extend beyond the remit of EU law, it imposes few limits on what can be demanded or offered. In looking at the powers granted to the EU Institutions, the Court did not examine whether these were performing radically new tasks but rather at the governmental objectives to which these to contribute. It noted that the ECB was required to support the economic policies of the Union and that the Commission was to promote the general interest of the Union under the ESM Treaty, and this was sufficient.¹⁵⁴ Finally, the legal quality of the conditions to be met by the State in this Memorandum is unclear for it is not a treaty or instrument of EU law. It is a decision outside the law. However, it is also a decision which gives rise to law, insofar as both creditor and debtor States will have to take legal measures to implement it.

The final feature of the sovereign is that it decides who constitute members of the political community. For Schmitt, this goes to the political quality of the sovereign. It is to decide who is outside the political community and therefore the enemy of that community. This goes to the question of that community's existence.¹⁵⁵ If the ESM Treaty is silent on this, EU government is not. The President of Commission has indicated that overcoming the crisis represented 'a fight for European integration itself'.¹⁵⁶ Alongside this, the crisis is presented as one of systemic risk whereby the whole European political economy could collapse as a consequence of the ripple effects from either a sovereign debt default

¹⁵¹ Case C-370/12 *Pringle v Ireland*, Judgment of 27 November 2012.

¹⁵² *Ibid.*, para 158.

¹⁵³ Treaty establishing the European Stability Mechanism, T/ESM 2012/en 1, article 13(3).

¹⁵⁴ Case C-370/12 *Pringle* supra n. 143, paras 162-169.

¹⁵⁵ C. Schmitt, *Constitutional Theory* (2008, Duke University Press) 389.

¹⁵⁶ J. Barroso, *Speech to the European Parliament during the debate on the economic crises*, 14 September 2011, Speech/11/572, http://europa.eu/rapid/press-release_SPEECH-11-572_en.htm?locale=en, <accessed 10 March 2013>

or a bankruptcy of a large commercial bank.¹⁵⁷ To refuse aid or to default is to be an enemy not simply of the euro but, presented like this, of Europe itself. It is not clear what possibility for membership of the Union exists for States who default.

Wisely, the German Constitutional Court never explicitly vests sovereignty in the ESM in its *ESM (Temporary Injunctions)* judgment. It is seen, however, as the next worse thing: an exercise of democratic sovereignty. This is used to legitimate an EU governmental machine which claims if not a general right to rule, then certainly an open-ended power of government. It is to govern those activities seen as central to generating ties of solidarity within domestic societies in which the needs and aspirations of citizens are supported not because they contribute to some policy or goal but because they allow a collective dignity and flourishing. In a sovereign governmental world, these ties matter less than the central concern of sustaining sovereign power. Insofar as governmental rule rests on sustaining external activities as a series of well-functioning orders, and these activities are more often than not marked by instability and disjuncture, sovereign government becomes a normative imperative to secure ever wider rule not merely to secure the good functioning of the external activities that is the business of government but to safeguard the (perceived) survival of the political system.¹⁵⁸

VI. CONCLUSION

The genius and the folly of EU debates on sovereignty lie in their fluidity. The need for different interlocutors to justify sovereignty leads to different justifications and, in turn, different uses being found for it. This has led to a revitalisation of sovereignty as a concept: EU debates engage with the term like no other debates. Further, sovereignty is granted an emancipatory potential. It is difficult to explain its appeal if it is not a tool of self-assertion and protest. One root of this appeal lies in sovereignty emphasising the multiplicity of associative ties which sustain any political community. If government brings people together to realise common purposes, these will never be sufficient and will inevitably have divisive qualities insofar as the common purpose generates winners and losers. The rule of the sovereign emphasises that another form of association is necessary for political communities in which ties are built simply on co-presence and mutual

¹⁵⁷ I.e. Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ 2011, L 306/8, in particular article 3(2).

¹⁵⁸ To secure 'genuine' economic and monetary union, an extension of EU government has been called for. Contracts between each euro area State and the EU Institutions will be made governing all fields of activity covered by the ESM Treaty (i.e. welfare policy, labour, capital and service market regulation, fiscal policy). These will apply to all euro area States and will be indefinite. There will be accountability to national parliaments and the European Parliament for content and implementation. It is not clear, however, that these will be involved in the formulation of these non-legislative documents. President of the European Council Report, *Towards a Genuine Economic and Monetary Union* (2012, Brussels) 13-16.

recognition on one's equality before the sovereign. If it has many limits, it can nevertheless better capture the singularity of subjects and ideas of kinship. The other root of sovereignty's appeal lies in the contingency and limited materiality it ascribes to governmental power. It captures the need for government to be seen as perennially insufficient in what it can offer: be these limits in the government's resources, its cognitive blinkers, its potential for abuse or simply its confined materiality.

The deployment of the term has, nevertheless, been fraught and unsatisfactory. In large part this is because, as sovereignty asserts a strong power, it has habitually been used by the powerful to consolidate power. This consolidation has taken the form of its rendering national rulers unaccountable or its being used to justify centralised EU intervention. This might be simply innate to the term. It lacks insufficient safeguards to prevent its abuse. However, something else has taken place within the EU debate. The unity of the relationship between rulers and ruled, which sovereignty has traditionally signified, has been lost. This unity involves subjects submitting themselves to the rule of the sovereign but the *quid pro quo* is that the sovereign rules for the benefit of its subjects. In contrast, in EU debates sovereignty has become a terrain for competition over which administration rules. In this arm wrestle between administrations, the *quid pro quo* made with subjects is forgotten. In principle, national or EU administrations govern for the ruled. If this were brought more to the fore, this would entitle the ruled, whether as a national political community or pan Union one, to say to any administration 'Enough! This does not work for us the sovereign!' In short, sovereignty in EU debates should emphasise more the political limits of all rule. This is the message from the Lithuanian Constitution which is quoted in the Introduction. It is a pity that EU debates about sovereignty do not take place more often in Lithuanian.