Federalism, Confederalism and Sovereignty Claims: Understanding the Democracy Game in the European Union

Forthcoming in R. Adler-Nissen and T. Gammeltoft-Hansen (eds), *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond* (New York: Palgrave).

"Sovereignty is about a claimed status but not about the problems these claims raise"

(Werner and de Wilde 2001, 296)

1. Introduction: EU Democracy and the Tension between Federalism and Confederalism

It is commonly assumed that sovereignty is indivisible and hence that in any polity there has to be an institution able to claim ultimate political authority. By implication, indivisibility also means that confederation (a union of states) and federation (one state with more or less autonomous units) are mutually exclusive categories: "there can be nothing in between" (Onuf 1991, 432). Nevertheless, the EU seems to be precisely the "in between order" (Wind 2001, 103; cf. Sørensen 1999) that undermines such peremptory statements about the nature of sovereignty. The complicated story of sovereignty within the EU is accompanied by an equally unusual and problematic system of democratic accountability. Whereas other chapters in this volume emphasize the way states play games with sovereignty for manifold ends, this contribution examines the manner in which EU member states' sovereignty claims constitute playing a game with democracy itself. Whilst EU democracy has often been seen as etiolated, this chapter argues that – unlike many democratizing proposals that seek to overcome or bury member state sovereignty claims – such claims should

in fact be understood as an essential feature of the complex art of negotiating the relationship between integration and EU democracy.

It is important, for the purposes of the argument, to recognize that there is a fundamental tension between federal and confederal principles of organizing political authority (Hamilton et al. 2003). In a pure confederation, the unit of political representation is solely a collective one (a people, a state) and legal acts fall on states in their "corporate or collective capacities" (*ibid.* 67). Thus a confederal political order is "a contractual union of states" (Forsyth 1981, 3). Conversely, in a federal order, individuals are represented alongside territorial units for the purposes of decision-making and legislation touches citizens directly (Hamilton et al. 2003). The representation of individuals thus circumscribes the autonomy of constituent units – it may also potentially alter their sovereign equality by giving more influence to the most populous units. The existence of federally-guaranteed individual rights constitutes another major potential restriction on the sovereign capacities of units within a federal system. The EU's hybrid system of federalism and confederalism is thus characterized by the creation of an autonomous, constitutionalized legal order consisting of individual rights (Weiler 1999) alongside a political order where major decisions are taken by member states, often as (supposedly) equal participants.

This chapter rests on the supposition that the antagonism between these two, federal and confederal, principles is at the heart of the sovereignty game of integration and has important consequences for the functioning of democracy in Europe. The intention is less to make a point about the nature of sovereignty than to demonstrate the use to which sovereignty is put in the process of integration and to consider the consequences this has for democratic theory and practice. Interpreting the balance of confederalism and federalism as a sovereignty game, the argument traces the evolution of this central integrationist tension to show that the amalgamation of both principles is a very taxing game. This game is both ideological (based on national or supranational attachment)

and rational (actors' preferences often depend on perceived interests). However, given that sovereignty is a claimed *status* that is most asserted precisely when that status is challenged (Werner and de Wilde 2001),[1] this chapter focuses in particular on the moments when member states have used sovereignty claims either to try to limit the supranational character of integration or to establish special rights for certain states.

The sovereignty game of integration has a profound impact on democracy since changes to a state's claimed status of sovereignty invariably affect democratic processes (Bartolini 2005; Bickerton et al. 2006). This is because state sovereignty and popular sovereignty in the democratic era are mutually constitutive and cannot be easily disentangled (Walker 2007). Thus, the mixture of confederalism and federalism in the EU system is the key to understanding the democracy game of European integration.

The purpose of this contribution is threefold, as reflected in the tripartite division of the chapter. The first objective is to describe and explain the sovereignty game of integration by reference to how sovereignty claims have produced the unusual mixture of federal and confederal principles of representation. The second goal is to show that this sovereignty game is also a democracy game and analyze accordingly the problematic consequences this second game has had on the member states and the EU alike. The third and final ambition is to explore how adequately various proposals regarding how to respond to these changes in the nature and practice of democracy deal with the problem of sovereignty claims.

2. Assertions of Sovereignty and the Combination of Confederalism and Federalism in the Sovereignty Game of Integration

European integration's impact on the Westphalian notion of the state is often understood in dichotomous terms (Jackson 1999). For some, the EU is no threat to state sovereignty (Moravcsik 1993; Keohane 2002); others regard the EU as

the symbol of a fundamentally changed, post-sovereign order (MacCormick 1999; Weiler 1999; Bellamy 2003). Typically, this polarized debate has recourse to some form of quantification of the extent to which sovereignty has been pooled (Donahue and Pollack 2001; McKay 2001) and tracing the motives for this common undertaking (Moravcsik 1998). However, such a debate does not necessarily tell us much about sovereignty since the arguments largely revolve around questions of substantial statehood as a capacity for certain actions (Sørensen 1999) rather than sovereignty as a claimed status. An alternative conceptual framework has tried to bypass these antinomies by using the notion of "interdependence sovereignty" (Krasner 1999) to explain the somewhat perplexing situation whereby states are losing individual control over certain transnational interactions whilst gaining a collective capacity to deal with them. Yet Jackson (1999) maintains that conceptualizing sovereignty as a resource that can be transferred, as Keohane (2002) does for instance, is a solecism.[2]

The intention here is to side-step these controversies about the era of sovereignty in which we live. Instead, this section focuses on identifying assertions of sovereignty by member states as responses to the process of integration. These assertions are understood as essential to the maintenance of confederal principles within the hybrid system of political representation described above. The argument thus conceptualizes sovereignty not as a set of rights – easily identifiable, like the fasces carried by the Roman lictors – but as a claimed status which is then used "to legitimize certain rights, duties and competences" (Werner and de Wilde 2001, 297). Hence the analysis presents sovereignty claims as crucial instruments in constituting the EU political system.

As befits a complex concept like sovereignty, these assertions take various forms. However, not included within this category are instances of attempted legal resistance to EU supremacy (Goldstein 2001) or simple non-compliance (Falkner et al. 2004), because neither is part of the formal sovereignty game of delimiting the scope of the integration process and defining the status of member

state sovereignty within this process. Rather, the term assertion refers here to those actions that either serve to establish a special status or rights for a certain state (or several) or else those that try to set boundaries to the scope of supranationalism, thereby protecting the sovereignty claims of all. Amongst the latter figure the remaining unanimity requirement in certain policy areas, the creation, in foreign policy as well as judicial and police co-operation, of a separate decision-making system with a separate legal basis attenuating the supervisory power of the European Court of Justice (ECJ), and the treaty-based prohibition of legal harmonization in certain policy areas. As regards the former type of sovereignty assertion, the measures include treaty protocols, opt-outs and national referendums on EU matters, although this is not an exhaustive list. What follows is a brief description of these two types of sovereignty assertion and an explanation of how they have produced a dual system of political representation.

Sovereignty Assertions as Barriers to Supranationalism

As a hybrid polity the EU walks a tightrope between intergovernmentalism and supranationalism. From the outset, integration entrenched the "community method," incorporating the supranational principle, rather than the historically plausible alternative of a purely confederal institutional model (Parsons 2003). In fact, the first manifestation of a sovereignty assertion within the integration framework was an assault on the supranational principle itself: the "empty chair crisis" of 1965-6. Although de Gaulle's diplomatic struggle took the form of an institutional conflict – France's refusal to participate in meetings of the Council of Ministers, the senior legislative body representing states' interests – it was largely a debate over norms and expectations as de Gaulle refused to accept European Economic Community (EEC) competency except through unanimity.

Having briefly toyed with renegotiating the EEC Treaty, de Gaulle eventually "committed to the Community track but refused new progress along it" (*ibid*. 126)

by forcing the “Luxembourg Compromise” upon the other member states. Hence the solution was not to re-design institutions but to establish a new norm: “when very important issues are at stake, discussions must be continued until unanimous agreement is reached.” Thus what was secured was not the sovereign status or prerogatives of a particular member state; unanimity preserves the formal equal status of all. Although informal, the Luxembourg compromise had long-lasting effects on integration (Garrett 1995). Yet supranationalism did not fall by the wayside. Subsequent battles between unanimity and qualified majority voting, however, gave rise to more formal attempts to use the confederal principle to limit the reach of supranationalism.

Several attempts to counterbalance the deepening of integration with a renewed commitment to intergovernmentalism are worthy of mention here. The first concerns the remnants of the Luxembourg compromise in what is now termed the first policy “pillar.” In this pillar, where qualified majority voting (QMV) has become the norm, treaty reform, the accession of new member states and taxation remain subject to unanimous decision-making (Magnette 2005). The veto on treaty amendment, in particular, ensures that the EU appears a strictly voluntary association of sovereign states for the pursuit of mutual advantage (Boucher 2005, 103). Unanimous treaty amendment – in effect the process by which the units may alter the purposes for which they associate (*ibid*.) – is fully in keeping with international law. Under Article 40.4 of the Vienna Convention on the Law of Treaties (1969), states cannot be forced to become parties to amended multilateral treaties to which they have not consented (Witte 2004b).

The confederal character of such an arrangement is pellucid. The EU treaty amendment procedure establishes a unity constituted by all states as equals – it is “a contract between equals to act henceforth as one” (Forysth 1981, 16) – rather than the federal alternative of a unity formed from a majority of citizens and/or a qualified majority of states (Trechsel 2005; Auer 2007). In this way, first pillar vetoes are part of the reason why member states can still successfully

claim sovereign status and "enjoy the rights and powers related to that status" (Werner and de Wilde 2001, 304). Moreover, the unanimity requirement for admitting new members, which accords with the definition of sovereignty as the exclusive "ability to make authoritative political decisions" (Thompson 1995, 216), further underlines the equality of states. The corollary of having the authority to determine membership expansion is the member states' prerogative to determine their continued adherence to the EU. The EU Lisbon Treaty now outlines the terms for voluntary withdrawal (Article 35), which for some is definitive proof of member states' retention of sovereignty (Sørensen 1999; Boucher 2005).[3] Whatever the precise implication for state sovereignty, the right of withdrawal certainly means that there cannot be the same agonizing over whether the EU is a perpetual union as there was in the antebellum US (Stampp 1978). In the pro- and anti-integration cleavage, this unambiguous confederal element – even if no mainstream party in Europe advocates quitting the union – thus serves to reassure the constituency of voters attached to the shibboleth of sovereignty.

The hybrid nature of representation was further complicated by the creation of the so-called second and third policy "pillars" at Maastricht, which added a new confederal element. Unanimous decision-making in these sensitive policy areas, foreign policy and judicial and police co-operation respectively, was obviously in large part motivated by member states' understanding of sovereignty as both authority and control (Thompson 1995). However, the member states were not simply protecting their competences, they were also defending the right of states to represent their citizens. Thus what is especially interesting about this sovereignty game is the way in which both these intergovernmental pillars were insulated, to varying degrees, from the institutions of supranational representation, namely the Commission, the European Parliament and the ECJ (Börzel 2005). In particular, by restricting the jurisdiction of the ECJ over these policy areas, the states ensured that legal acts bind states in their corporate or collective capacities and do not create rights for individuals. Even though the Lisbon Treaty abolishes the pillar system, the circumscription of ECJ jurisdiction

is maintained. A precedent for such a move can be found in the Amsterdam Treaty, where elements of the former Justice and Home Affairs pillar were integrated into the first pillar although the procedures for legislating in this area did not follow orthodox community law (Hanf 2001). The insistence on unanimity, member state co-power of initiative and reduced ECJ jurisdiction, has resulted in what has been described as the creation of a new hybrid, "intergovernmentalised EC law" (*ibid*. 17). Indeed, this move has given rise to a new inter-institutional sovereignty game as the Commission and Council of Ministers clash over which legal regime relevant legislation should fall under.[4]

There were other attempts at Maastricht to delimit the potential expansion of supranationalism. One such was the introduction of the subsidiarity principle, which defined efficiency as the deciding principle for the level at which power will be exercised so that the EU can legislate "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community" (Article 3b). This was supposed to "enhance further the democratic and efficient functioning of the institutions" (Preamble) by ensuring that political decisions "are taken as closely as possible to the citizen" (Preamble). Subsidiarity was pushed by the most adamantine champion of sovereignty, the UK, in order to establish that "member states are not prepared to accept an unlimited extension of Community competences" (Dehousse 1994, 125).

However, the subsidiarity principle has not established the boundaries of national and European competences respectively. This is because it employs the criterion of effectiveness for defining the applicable level of government action. This means that the ECJ is not called upon to rule on *Kompetenz-Kompetenz* directly, rather the court is to rule "on the compared efficiency of both [national and European] types of measure" (*ibid*. 110). Even at the time of introduction a leading EU lawyer declared that it would prove a stillborn clause (*ibid*.: 124) and

time has proved this claim correct as the ECJ has only made two explicit subsidiarity rulings (Magnette 2005, 54). The initial failure of subsidiarity illustrates the difficulty of specifying exactly how sovereignty claims fit into the EU system. Yet the desire to allow states to use sovereignty claims to establish the division of competences continues. Hence the new role for national parliaments envisaged by the Lisbon Treaty, including both the "early warning" procedure (Protocol 2, Article 7) that forces a legislative draft to be reviewed if a third of national parliaments declare it to violate the subsidiarity principle and the attribution of veto power over unanimous Council of Ministers decisions to move to QMV in certain policy areas. Moreover a further declaration on the delimitation of competences for the first time specifies that in revising the treaties member states can choose to "reduce the competences conferred on the Union."

The second method of limiting the transfer of competences for the foreseeable future was the introduction into the amended treaty of Rome of specific clauses prohibiting harmonization in certain policy areas. In the fields of education (Article 126), vocational training (127), culture (128) and public health (129) [now 149-152 EC] the European Union was only permitted to "adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States." Moreover, the tension between diversity and uniformity has also given rise to the development of "flexibility" within the single market framework by adopting the principle of minimum standard harmonization (Barnard 2000). Minimal standards do not, in areas like consumer protection (Article 153 (5) EC) or public health (Article 152 (4a) EC), prevent member states imposing higher national standards provided they meet certain justifiable conditions (Hanf 2001).

Sovereignty assertions as barriers to supranationalism, therefore, have played a key role in the construction of the political constitution of Europe. This sovereignty game has been played in order to limit the supranational ambitions of the European project by devising rules and procedures that protect the sovereignty claims of all states. However, there is another category of

sovereignty assertion that needs to be explored: when individual states affirm their right to a special status thereby creating rules of their own making.

Sovereignty Assertions as a State's Right to a Special Status

This second type of sovereignty claim is perhaps most visible in various treaty protocols that mention the specific treatment reserved for certain states.[5] For instance, both Ireland (Protocol 17, Maastricht Treaty) and Malta (Protocol 7, Accession Treaty) are guaranteed the autonomy to legislate on abortion, although the EU has never tried to do so and lacks the necessary competences. However, protocols need not be merely symbolic statements destined to reassure states and their citizens about what the EU cannot do. Since entry into the EEC in 1972, Denmark has restricted non-residents' right to buy second homes, especially in coastal areas. Its right to do so is a protocol privilege that goes directly against the single market's principle of free movement of capital. Other countries, with the exception of Malta, have not been permitted to restrict home ownership in this fashion.

The 2004 candidate countries – even though in areas with large pre-war German populations foreign home ownership was controversial – were allowed to place merely transitional restrictions on EU nationals' ownership of real estate (Mihaljek 2005). Only tiny Malta was granted a permanent derogation, as already mentioned. Thus, when viewed from the perspective of sovereignty as "meta-political authority" (Thompson 1995, 214), the Danish state has kept its ability to treat foreign home ownership as a domestic political issue. Even though property speculation based on capital inflows can have a serious impact on housing affordability for the local population, potentially causing other socio-economic problems, EU member states (with the two exceptions mentioned above) have effectively agreed to depoliticize this issue since they no longer individually wield authority in this area.

Akin to the above protocol guarantees are policy opt-outs. The latter are *ex ante* treaty agreements allowing member states not to participate in a new community policy. Opt-outs are a practical tool for enabling the inclusion of new political objectives within the treaty framework despite the opposition of certain states (Hanf 2001). Recalcitrant member states agree not to block treaty reform on condition that they will not be bound by these new arrangements. The first opt-outs were brokered at Maastricht. The UK opted out of the third stage of economic and monetary union, the single currency, as well as spurning the Protocol on Social Policy (Raepenbusch and Hank 2001).[6] Denmark similarly refused to convert to the euro and also turned its back on defense co-operation in the nascent Common Foreign and Security Policy (Hansen 2002).[7] Later rounds of treaty amendment continued the opt-out trend favored by these same protagonists. The UK and Ireland (bundled together because of their Common Travel Area) opted out of the communitarization of visas, asylum and immigration (Shaw 1998). Denmark did likewise but its opt-out is legally and practically different since, unlike the UK and Ireland, the country is part of the Schengen free travel area (*ibid.*; Adler-Nissen, this volume).

The opt-outs on the single currency were initially considered to be merely temporary derogations. However, more than a decade later, Denmark and the UK still remain beyond the euro pale whilst Sweden, not a member at the time of Maastricht, unilaterally refused to join (Lindahl and Naurin 2005). As concessions to confederalism, these assertions of sovereignty are practically, but above all symbolically, significant. In particular, they reveal certain countries' ability to define a special status for themselves within the EU. Arguably, certain non-members have likewise negotiated their relationship with the EU on the basis of identity-based sovereignty claims that privilege the symbolic value of staying outside the fold above having a say in a process of integration into which they are inexorably drawn. Thus non-membership is nevertheless compatible with participation in Schengen (Iceland, Norway and Switzerland), the adoption of

single market legislation (Iceland, Norway and Switzerland) and even financial solidarity (Switzerland awarded one billion francs to the 2004 accession states).

Intimately bound up with the euro opt-outs – as well as the ultimate opt-out of refusing membership, as occurred in the Norwegian and Swiss cases – is the phenomenon of the national referendum, which should be understood as an assertion of sovereignty. Whereas the other sovereignty assertions described here have been exercised by governments, acting in the name of a state, referendums are expressions of popular sovereignty even if they are often called at the discretion of the government of the day.[8] Referendums have been held on enlargement, accession, continued membership, treaty reform and the euro. Since this form of ratification is not prescribed by the EU, referendums in principle embody the autonomy of member states in choosing how to deal with the political challenge of integration. However, a government's decision to call a referendum can also be influenced by domestic political considerations far-removed from EU constitutional politics, which makes them unpredictable and hard to handle. Regardless of this dark side of referendums, their increasing use has made it much more difficult for governments to reject out of hand this mode of ratification for treaty revision. This can be seen both from the repeated calls in several member states for the Lisbon Treaty to be put to a popular vote and the care with which certain constitutional elements (the name itself but also the EU anthem and hymn) were jettisoned to allow governments to tell their citizens that these revisions were not substantive enough to warrant a referendum.

Paradoxically, although direct democracy at the national level symbolizes the confederal principle of collective representation, referendums can run counter to the other confederal principle of state equality. This is because votes in one member state may have important ramifications on others. Such a state of affairs is exactly what occurred in the aftermath of the French and Dutch popular rejections of the draft EU Constitution in 2005. Member states that ratified the EU Constitution – the outcome of a strictly confederal, that is, unanimous and equal,

process – were prevented from putting into operation this new treaty as a result of popular sovereignty in two member states. This tension is set to increase in the future as the French constitution has been changed to ensure that there is an automatic referendum on any future enlargement (Article 88.5).[9] Thus France will have a special – hence unequal – right to decide the fate of membership applications twice, firstly through government representation and secondly by the people directly.

The fact that national referendums on treaties have implications stretching beyond the borders of the member state in question has been used to argue that it is simply irresponsible to subject the constitutional future of the EU to national votes (Auer 2007). However, to deny states this authority would amount to a serious restriction of the confederal principle of representation as the only alternative is some kind of Europe-wide referendum based either on a majority of individuals or a double majority of states and citizens as happens in Switzerland. Furthermore, the critique of national referendums is also a denial of the national political community as a *pouvoir constituant* capable of changing the very form of government of a state (Yack 2001). It is precisely in this constituent capacity that the people redeem their right to self-government – implying that they are responsible to no third party – thereby constituting the basis for state legitimation in the modern era (Hont 1994). This explains why the federal alternative, a pan-European popular sovereignty, is so attractive. The formula sounds perfect: supranational legitimacy for a supranational project. Yet as the above discussion has shown, states have used sovereignty claims precisely to limit the supranational scope of the project and to ground – often on the basis of popular pressure – its legitimacy on confederal representation.

As revealed in the analysis above, the sovereignty game is something far more complex than a zero-sum game where sovereignty is imagined to be an indivisible capacity that is necessarily transferred from one institutional actor to another. If anything, the evolution of member states' claim to sovereign status as

a result of integration has made their assertion of this claim *more rather than less relevant to EU politics*. Consequently, EU politics is now confronted with a "sovereignty surplus," characterized by multiple and overlapping sovereignty claims (Walker 2007). Yet it remains to be seen what the impact of the sovereignty game – the result of compounding systems of political representation – has had on democracy. This is a particularly pressing question given that democracy is traditionally associated with an ultimately exclusive model of sovereignty (*ibid*.).

Hence the next section of the chapter is devoted to understanding how exactly the EU hybrid polity's reworking of sovereignty challenges the concept and practice of democracy in Europe. Diagnoses of and remedies for the contemporary ailments of democracy caused by the sovereignty game of integration differ markedly but they seldom make reference to the principles of political representation structuring the EU polity. The fourth and final section reviews these assessments of and proposals for dealing with the consequences of integration from the perspective of how they address the problem of sovereignty claims. In this way, the ambition is to offer a new angle for interpreting the appropriateness of proposals for coming to terms with the effects of integration on democracy.

3. Sovereignty Games and Democracy in the EU

Federal, confederal and compound forms of representation have long been thought to affect the nature of democracy (Hamilton et al. 2003). After all, the point of the American federal experiment was to make popular sovereignty compatible with liberty (Tocqueville 1994). In reality, the relationship also works the other way round as Carl Schmitt argued that "the federal foundation and federalism itself are destroyed by the democratic concept of the constituent power of the *whole* people" (1992, 55). According to Schmitt, the democratization of the US in the nineteenth century resulted in "a federal state without a federal

foundation" (*ibid.*). Similarly, cultural factors are also part of the representation and democracy equation.[10] It has been shown, for instance, that in federal Austria and Germany a common linguistic and cultural community results in a nation-wide demos that discusses politics from a centralized rather than fragmented perspective (Erk 2003, 2004). However, given the dual nature of the EU as both a commonwealth in itself and a union of commonwealths, the impact of the above sovereignty games is Janus-like, affecting both EU democracy and member-state democracy. Hence the strategic relationship between sovereignty, integration and democracy will be examined from this dual perspective, albeit briefly since this section is intended as a prelude to a discussion of the reform proposals that have arisen from the changed context of European democracy.

Sovereignty Games and EU Democracy

A common complaint regarding the EU polity is its complexity, aptly illustrated by the up to thirty different steps of the current codecision procedure. In fact, the problem of complexity is the defining characteristic of pluralist democracies when compared with parliamentary models of democracy (Coultrap 1999). EU pluralism is precisely the result of adopting the dual system of representation as an alternative to an uncomplicated supranational majoritarian system that would ride roughshod over state sovereignty claims. The result is a vertical and horizontal separation of powers that promotes consensus through mutual checks and balances as well as continual institutional dialogue. This plural regime, however, is distinctly out of kilter with many citizens' notions of politics based on the operation of parliamentary democracy (Schmidt 2004). In fact, the alien nature of the EU's consensus-based model of democracy has been used as a justification for shielding it from referendum votes in which citizens cannot appreciate properly the merits of the system (Dehousse 2006; Moravcsik 2006).

Regardless of the more subjective issue of whether the EU system is beyond the ken of most ordinary citizens, political scientists have identified a host of other

problems resulting from Europe's peculiar dual representation that vexes democracy. Notable amongst these is the lack of transparent decision-making arising from the closed meetings of the Council of Ministers – secrecy being the cloak behind which diplomatic maneuverings between states try to reach consensus positions (Hayes-Renshaw and Wallace 2006, 342). In addition, the low salience of many problems of regulatory policy within the compass of EU authority in tandem with the opaqueness and technocratic element of decision-making favors the access of corporate interest groups to the detriment of civil society (Streeck and Schmitter 1991).

Moreover, the treaty bargains struck over the size of each member state's cohort of representatives in the European Parliament have produced a serious imbalance of representation, with the small countries well over-represented in terms of citizens per Member of the European Parliament (MEP) (Rodden 2002). Of course, federal systems almost universally contain some form of unequal representation to prevent simple majoritarianism (Dahl 2001, 47). However, the peculiarity of the EU is that, besides the evident anti-majoritarian devices of unanimity and QMV in the Council of Ministers, the institution supposed to embody the principle of popular sovereignty, the European Parliament, is also seriously malapportioned. Owing precisely to the need to respect the status of member states, small countries have obtained a highly generous over-representation of MEPs per capita – so much so that the EU's directly elected legislature is the world's second most malapportioned lower house (Rodden 2002, 155).

Yet the most important democratic consequence of the sovereignty game of integration for the EU has been the hollowness of European public participation, debate and accountability (Schmidt 2004). The abstruse, consensus-building model of politics dominated by national executives rather than European political parties has combined with a variety of other factors, including public indifference, to hamper electoral contestation of leadership and policy (Follesdal and Hix

2005). The low salience of the business of the European Parliament is not surprising given that the member states have tried to prevent this supranational body from diminishing the importance of the confederal principle of representation. This effort has also drawn succor from national parties' disinclination to politicize the integration cleavage within the domestic arena (Mair 2005), a cleavage which is in any case not isomorphic with the traditional left/right dimension of European politics (Bartolini 2005). The net result, therefore, is a polity that, unlike European nation-states, is not based on government by the people through active popular participation nor does is follow the logic of a government of the people courtesy of elected representatives and neither is it really government for the people because its effectiveness is easy to call into question (Schmidt 2004, 977).

Sovereignty Games and Democracy in the Member States

Since the impact of the sovereignty game of integration on democracy in the EU's member states is an equally familiar part of the EU studies literature only a brief exposition is necessary. Domestic politics has been adversely affected by more than simply the growth of supranationalism, which challenges claims to domestic autonomy. The way in which the sovereignty game of integration is played – national governments are key actors in this process – has also proved significant, with the need to maintain a complex hybrid polity a large factor in the problems this has posed for democracy.

Firstly, there has been the augmentation in the discretionary power of national executives as a result of their participation in transnational governance structures that are more isolated from the gaze of national parliamentary scrutiny (Anderson and Burns, 1996; Raunio 1999). Secondly, the creation of a new institutional level for policy-making has also allowed executives to "venue shop" in order to find a more favorable arena for implementing their preferences (Guiraudon 2000). Venue shopping, alongside the secrecy of the Council of Ministers, also

profits governments by facilitating the blame avoidance potential that exists where there is a two-level game of international bargaining (Vaubel 1994; Rotte 1998). Both these changes in national democratic practices, therefore, relate to the powers member states derive from the confederal element of the EU.

Thirdly, and perhaps most importantly, the sovereignty game has profoundly affected democracy by altering member states' ability to define the political, what Thompson (1995) calls "meta-political authority." As described above, integration has in many policy areas diminished states' capacity to define an issue as a political problem requiring a domestic solution. This is a recurrent trend in everyday EU politics. It is well illustrated by the recent conflict between the Commission and Austria as a result of the latter's attempt to restrict the number of German students studying in its medical and dental faculties because Austria does not use a *numerus clausus* entry system. In this example, following a 2005 ECJ ruling,[11] (a similar problem has arisen in Belgium following an influx of French students), the Austrian government stands accused of breaching the principle of free movement of students, meaning that it is unable to define – and thus settle – a question of education policy as a domestic affair (Anderson and Glencross 2007).

Moreover, since member states are locked in to the sovereignty game it appears impossible for them to redefine an issue as one of domestic politics, even in the case of policy failure. Thus despite the dubious record of the Common Fisheries Policy in terms of stock conservation (Payne 2000), member states cannot try to remedy this failure on their own by opting out *ex post*, as shown by the *Factortame* case (MacCormick 1999). Hence national governments' ability to respond to policy problems or public concerns is now far more constrained than according to the simple domestic model of *lex posterior derogat legi priori*.

Since these changes in national democracy have also coincided with the democratic woes of the EU system as a whole, the net result has been the

"depoliticization" of European public life (Mair 2005, 2007; Schmidt 2006). Indeed, it appears that the thinness of EU democratic life has had a deleterious effect on national politics (Mair 2007, 8). Besides the circumscription of states' meta-political authority and their ability to respond to their citizens' concerns, the European project has seen the growing use of non-majoritarian institutions "from which politics and parties are deliberately excluded" (Mair 2005, 12). Given this reconfiguration of European democracy it is no surprise that manifold proposals have been put forward in order to come to terms with the impact of the sovereignty game on democracy. In particular, given that the causality behind this relationship seems to stem from the EU level downwards, the mooted reforms invariably have as their starting point EU democracy. The following section analyses the arguments that dominate this debate by looking at whether their attempts to respond to the democracy game take account of how the sovereignty game has reconfigured democracy.

4. Reconciling Integration with Democracy: The Problematic Role of Sovereignty Claims

Participants in the debate about how to reconcile European integration with democracy can be separated into two main camps. Whereas some propose a more or less radical restructuring of the EU in order to breathe new democratic life into its institutions, others believe it is more germane to use this opportunity to reconsider the nature of contemporary democratic practices. It would be histrionic to say that there is an enormous gulf between these two visions of the state of democracy in Europe. Nevertheless, there is a clear line of separation demarcating those who fret not about the health of EU democracy, like Coultrap (1999), Moravcsik (2006) and Majone (2006) and those who recommend immediate action to improve its democratic legitimacy (Schmitter 2000; Hix 2007). However, upon closer scrutiny, both these perspectives seem problematic when it comes to appreciating the crucial role of sovereignty claims in the construction of the EU. Changing the democracy game of the EU polity will

significantly affect the sovereignty game – just as the latter has reconfigured the former. Hence proposals for reforming the EU in the name of democracy, if they are to be convincing, have to take seriously the sovereignty game. In particular, if the intention is to find an alternative to sovereignty claims because they have proved problematic for democracy, these proposals have to give a convincing account of what will replace or abolish the instrumental use of sovereignty claims.

Democratizing the EU: Overcoming Sovereignty Claims through Supranationalism?

Democratizing the EU is synonymous with increasing the importance of supranational representation at the expense of confederalism. Hence the usual suggestions are threefold: beef up the powers of the EP (Andersen and Burns 1996), turn the Council of Ministers into an upper house alone (Habermas 2001) and find new ways of engendering the transnational representation of citizens, either through pan-European referendums (Auer 2007) or the promotion of supranational citizen associations (Schmitter 2000). In every case, the intention is to reduce the veto power of the member states thereby interfering with their claims to sovereign status as embodied by unanimity in the Council of Ministers or the right to reject treaty change, including via referendum. The inevitable result of these proposals, therefore, is the reduction of the autonomy of the member states by curtailing their confederal capacity to reject EU treaty amendment or negotiate consensus compromises by wielding the veto threat.

Other institutional reforms seek to enhance supranational representation for the sake of greater efficiency, which, it is thought, will in turn lead to greater output legitimacy. This is the case for the establishment of the new president of the European Council, the highest political body comprising heads of state or governments of the member states meeting four times a year, and the eventual abolition of the one state one commissioner rule contained in the Lisbon Treaty.

In fact, both these reforms would constitute a new departure in the sovereignty game as they clearly go against the principle of state equality that is fundamental in confederal representation. By abolishing the rotating European Council presidency and the automatic award of a Commissioner, the sovereignty claims of small countries – sometimes the only asset they have left (Werner and de Wilde 2001, 304) – will no longer prove so useful or satisfying.

When viewed from a certain angle, of course, the notion of state equality appears dubious. The contrast, for instance, between the fallout from the French "no" to the EU Constitution which the EU political elite has still barely digested and previous referendum rejections that led immediately to new votes is striking. However, reform of the presidency and the college of commissioners means that the confederal principle of state equality founded on states' sovereignty claims would be greatly attenuated. In particular, substantial and very visible changes to state equality, such as the loss of a commissioner, will greatly affect the element of majesty that underlies successful sovereignty claims (Onuf 1991). The importance of this aspect of sovereignty should not be underestimated, especially in so far as the majesty stemming from equal treatment sustains the state's relationship with what has been called the domestic audience for sovereignty claims (Werner and de Wilde 2001, 290). Hence the majesty stemming from state equality is not simply a question of respect from other states; it is also a feature of self-respect. In a reconfigured EU, nation-state majesty would, in all likelihood, have to be maintained or reinvented – which explains why the TEC fudged this matter.

All the above proposals for democratic EU reform thus represent an attempt to transform its hybrid nature of political representation by diluting the principle of confederalism that tries to uphold both member state equality and liberty. This suggests that the often-asserted claim that the equation between federalism and centralization so feared by the UK is "an ahistorical reading" (Dehousse 2005, 116) is misleading. The attenuation of the confederal principle of representation

may not automatically equate to a more overweening centre, but it would produce a concentration of political representation around that centre. Furthermore, by breaking down confederalism's anti-majoritarian bulwarks, such as vetoes and unanimous treaty revision, member states would find serious obstacles to sovereignty assertions, whether to limit supranationalism for all or to individually assert special claims.

In other words, the instrumental uses to which sovereignty claims could be put would simply diminish once it became harder to use them in practice. Such proposals rest on blatantly blithe assumptions, namely that not only will institutional arrangements render sovereignty claims unproblematic but that member states will accept such reforms in the first place. Yet the troubling feature of these proposals is less the latter assumption than the former, which fails to recognize the dynamic use to which sovereignty claims have been put in the course of integration as shown in section two. By recognizing this feature of integration it is possible to draw an entirely different conclusion than the prescription that sovereignty claims are simply a bother that have to be overcome. Given that sovereignty claims arise most when the claimed status of sovereignty is challenged (Werner and de Wilde 2001), it seems likely that further successful integration – at least according to the official motto of "united in diversity" – would require a new way of instrumentalizing sovereignty. Here is not the place to put forward detailed proposals on this subject. But it is relatively easy to single out new ways of articulating sovereignty claims perhaps consisting of a revamped subsidiarity system based on criteria of diversity rather than effectiveness, a reconfigured inter-institutional relationship allowing the Council of Ministers greater scope for amending legislation proposed by the Commission and the ability to re-assess ECJ rulings (both tabled by the UK government at the Amsterdam IGC), or even a version of the American constitutional doctrine of nullification (Tipton 1969) operating via national parliaments or direct democracy.

The analysis, in section three, of the reciprocal relationship between democracy and the sovereignty game of integration revealed the ongoing problem of incorporating the autonomy and equality of states within a democratic, partly supranational polity. Nevertheless, some of the literature on the EU's democratic deficit assumes – explicitly (Moravcsik 2006), or implicitly (Coultrap 1999; Follesdal and Hix 2005; Hix 2007) – the relative stability of the EU constitutional settlement. When this is the case, rather than requiring a democratization of the EU, the impact of the sovereignty game of integration on democracy is thought to demand above all a new understanding of democratic governance and how best it functions. Yet the question still remains as to what this means for sovereignty claims.

Democratic Governance: Can Sovereignty Claims be Buried?

Two strands of thought can be distinguished within the literature on democratic governance in the EU. The first tries to dispel fears about the hollowness of EU democracy; the second believes that within the existing system a dose of "limited democratic politics" (Hix 2007), based on the left/right dimension, needs to be injected to reconnect the polity with its citizens. Common to both is once again a sidelining of the problem of sovereignty claims within the delicate and, as seen above, highly contested system of EU competences and institutions.

Essentially, the first school is that of pluralist democracy. According to this model, whatever the alien nature of the mixed system in comparison to parliamentary regimes, the EU remains democratically legitimate thanks to its highly institutionalized checks and balances (Coultrap 1999; Majone 2006). Non-majoritarian institutions, it is insisted, are potentially just as legitimate as majoritarian ones. However, what matters in this case is institutional design and the nature of the objectives to be pursued (Majone 2005). Hence if the EU is to be faulted it is not for its democratic deficit but for unsound institutional design and inappropriate policy objectives (*ibid.*). Paradoxically, the solution mooted for

both these shortcomings is precisely a new constitutional settlement that would strengthen the confederal principle at the expense of the supranational, "community method" (*ibid*.). So it seems that after first dismissing the link between the sovereignty game of integration and the problem of democratic legitimacy, sovereignty claims reappear. Not for the sake of legitimacy but to make the system function better in terms of outputs. This only goes to show that there is good reason to believe that sovereignty claims, rather than having to be buried, can be used to tackle the problematic democratic consequences of the sovereignty game of integration.

The second way of understanding democratic governance is to assume that the current integration *status quo* is too entrenched to be reformed substantively, yet still amenable to the injection of left/right politics over policy choice (Follesdal and Hix 2005; Hix 2006, 2007). This politicization approach believes that a minimal majoritarian element is possible thanks to the QMV-elected president of the Commission, which allows a more partisan college (Hix 2006, 19). What is surprising about this argument, as Bartolini (2006) points out, is the fact that the left/right cleavage is bound to raise fundamental, if not disquieting, questions about the constitution of the EU system itself, notably its competences and decision-making rules. Indeed, the cleavage over integration itself within member states has become more noticeable. Research on the recent referendums in the four countries that submitted the EU Constitution to a popular vote, which produced two ratifications and two rejections, emphasizes the essential "first order," that is, European element, of the results (Glencross and Trechsel 2007). Thus it is not at all clear why a limited democratic politics of left/right policy choices in a polity that has little redistributive capacity should be a priority over the debate regarding the future shape of integration.

Attempts to reconcile integration with democracy, whether from the supranational perspective or the governance approach, thus stumble precisely over the question of sovereignty claims. This is because neither treats member states'

assertions of sovereignty as an integral part of how to respond to the intermeshed sovereignty and democracy games. Yet the uncanny feature of democratic legitimacy in the EU is the fact that this compound polity also rests on a compounded legitimacy: it "depends on both EU and national levels" (Schmidt 2004, 982). Since sovereignty claims are aimed at both external and internal audiences they seem uniquely capable of finding if not a solution then at least a *modus vivendi* for democracy and sovereignty games played out at two levels. As presented in section one, the current EU system demonstrates the creative use to which sovereignty assertions have been used in the construction of this hybrid polity. It is therefore odd to discover that such an instrument does not play a more prominent – as well as innovative – role in attempts to reconfigure the EU system.

5. Conclusions

By examining the contested principles of representation structuring the EU polity this chapter tried to shed some new light on the strategic relationship between sovereignty, integration and democracy. European integration poses manifold challenges to sovereignty and democracy. The result is a certain "deficit anxiety,"[12] prompting attempts to show that democracy can be reconciled with what is often called "post-sovereignty" but which is perhaps better captured by Walker's notion of a "sovereignty surplus" (2007, 5). No such guarantees or reassurances were offered here. Rather, the chapter demonstrated how the problem of reconciling sovereignty claims with democracy has become marginalized when it comes to finding solutions to the adverse effects of integration on democracy in Europe.

Current proposals to overcome or bury member states' sovereignty were shown to suffer from serious shortcomings. As a result, the analysis suggests that member state assertions of sovereignty ought to be considered as a means of negotiating the relationship between integration, sovereignty and democracy.

However, the recent experience of the Lisbon Treaty points to a continued failure to take sovereignty claims seriously. Most egregiously, the treaty was pruned of the rhetoric of its constitutional forebearer so as to give member states a ready excuse not to ratify it by referendum – despite retaining the vast majority of the institutional and decision-making changes contained in the EU Constitution. Obviously, this state of affairs is the product of member state collusion. Still under the shock of the referendum rejections of the EU Constitution in France and the Netherlands, Europe's political elite has opted to elide the sovereignty issue. Disingenuously, these elites portray the Lisbon Treaty as a tidying-up exercise without sovereignty implications, thereby rendering referendums redundant.

In this way the whole gamut of sovereignty claims – as barrier to supranationalism, as a state's right to a special status and as expression of popular sovereignty through referendums – has for the moment been buried. Yet the experience of integration is one of a welter of contestation and renegotiation over the rules of the game of integration politics, interspersed only briefly with moments of calm. With several important changes scheduled for future implementation, such as the eventual abolition of the one commissioner per country rule or the move towards a new system of QMV, and with the detail of others – notably the UK opt-out from the Charter of Fundamental Rights – unspecified, there are many looming complication. Perhaps it will be necessary for this new political settlement to be called into question before a collective epiphany about the role of sovereignty claims in the EU system is possible. Whatever the timing, this awakening will probably consist of the realization that the continuation of integration in a way acceptable to states and their citizens requires the juxtaposition of contradictory principles of representation that results from the use of sovereignty claims.

[1] Jackson (1999, 433) goes further in claiming that sovereignty is "an institution which is periodically renovated to respond to new historical circumstances".
[2] MacCormick (1999), famously, has taken a more nuanced view by likening sovereignty to virginity, *viz*. something that is lost but not gained by another party.
[3] The absence of a specific withdrawal clause did not prevent Greenland, which joined as part of the Kingdom of Denmark but obtained home rule in 1979, from seceding from the EEC in 1985 with the consent of the European Council. Witte (2004a) argues that a right of withdrawal under the EEC treaty can be implied from state practice in the EEC treaty given that the UK called a referendum in 1975 on continued membership of the European Communities.
[4] Such a conflict arose over the question of harmonizing criminal sanctions in the field of environmental protection. The Commission argued this should occur under the Community regime whilst the Council of Ministers sought to implement legislation as an EU framework decision. The ECJ ruled in favor of the Commission in Case C-176/03 *Commission v Council*.
[5] For reasons of conceptual clarity I do not dwell on the German Constitutional Court"s notorious decision on the constitutional validity of the Maastricht Treaty. This seems to represent an assertion of sovereignty to limit supranationalism but articulated in the name of an individual state, thereby blurring the conceptual framework adopted in this section.
[6] The UK subsequently signed up to the Social Protocol in 1997 following a change of government (Shaw 1998, 68).
[7] Denmark also obtained a specific guarantee that EU citizenship would not jeopardize Danish sovereignty on deciding matters of citizenship. In addition, Denmark was also exempted from supranational cooperation on asylum, immigration and judicial cooperation.
[8] Ireland, following a Supreme Court decision on the Single European Act, is the only member state constitutionally obliged to hold a referendum on EU treaty revision.
[9] The European precedent for holding a national vote on enlargement was France"s 1972 vote on EEC expansion.
[10] Schmitt probably overstates the importance of democratization as the post civil war era was notable for the construction of a national sense of political community (Greenfeld 1992). In fact, the relationship between democratization and nationalism is highly complex, as Yack (2001) has argued very powerfully that popular sovereignty as a modern phenomenon unintentionally fostered the assumption that political organization supposed a national community.
[11] C-147/03 *Commission v Austria* [2005] ECR I-5969.
[12] I credit this expression to Cormac Mac Amhlaigh of the European University Institute.

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