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Sovereignty in Theories of European Integration and the Perspective of the Polish Constitutional Tribunal

Abstract: *The subject of the article is the place of sovereignty in different theories of European integration. It is argued that European integration in traditional theories of integration, such as functionalism, neo-functionalism and federalism, limits the sovereignty of the Member States and leads to the establishment of a new political entity. Intergovernmental theories claim, on the other hand, that states retain sovereignty in this process. The multi-level governance approach assumes, in turn, that sovereignty is partially exercised by the state and partially by EU institutions. Constructivists approaches maintain that sovereignty never attains a final form and requires constant upkeep. In the judgements of the Polish Constitutional Tribunal sovereignty is not subject to division or delegation to the European Union. EU membership places limitations on the freedom to act, but this does not imply a loss of sovereignty. This position is closest to the realist theories and the intergovernmental approaches advocating that states retain their sovereignty in the process of European integration.*

Key words: European integration theory, sovereignty, neo-functionalism, multi-level governance, constructivism, Polish Constitutional Tribunal

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Introduction

The tenth anniversary of the enlargement of the European Union and the resultant membership of countries of Central and Eastern Europe induces us to reflect on the influence of European integration on state sovereignty. Sovereignty is a concept that theoreticians must address when discussing the future of the European Union. Questions about sovereignty are often asked in the 'new' Member States, which only recently regained full sovereignty after its forcible restriction during the Cold War. These countries are much more sensitive to limitations on sovereignty than the well-established Western democracies. Their concerns also facilitate theoretical interest in the issue of sovereignty in the European Union.

The quickening pace of European integration in recent years clearly indicates that the substance of state sovereignty in the European Union is changing. We can observe that states are outvoted in the Council and that the pressure, including even some degree of intolerance, on the part of other states limits the application of the ultimate instrument of sovereignty, namely the veto. State sovereignty had already suffered a blow through the gradual expansion of the principle of qualified majority voting, introduced by the Single European Act and consolidated in the Treaty of Maastricht. The second blow was the expansion of the co-decision procedure under the Treaty of Amsterdam and the Treaty of Lisbon, making the Council and the European Parliament equal participants in the procedure. With this the Council, which represents the voice of the states, has lost its monopoly on decision-making in the EU's institutional structure.

There are also opinions that in the search for more effective institutions and procedures required for the execution of policy on the European level, the European Union is forced to choose between strengthening intergovernmental cooperation, which involves difficulties in making, implementing and controlling decisions and can lead to the inefficiency of national institutions, systems and instruments; or establishing a federal state, which, in turn, involves directly upsetting the political systems of the European countries.

If we assume that sovereignty means having a monopoly over the use of force on a state's territory, it must be admitted that the EU member states retain their full sovereignty. The European Union has no military or police forces which it could use to enforce the law. On the other hand, however, when political control takes place in supranational institutions, the states' sovereignty in the political sense becomes restricted. The economic and political sanctions that the European Union can introduce limit sovereignty, understood as the state's freedom of action. If, in turn,

we assume that the ultimate instrument of sovereignty is the right of veto, we also have to surmise that state sovereignty is being gradually eroded by the decrease in the number of decisions which require unanimity, and by the Council's loss of its monopoly on decision-making by sharing competences with the European Parliament.

The research questions posed in the present article concern the place that state sovereignty holds in the theories of European integration, as well as the accordance of the position on sovereignty taken by the Constitutional Tribunal of the Republic of Poland with the principles of the analysed theories. The first part of this article discusses the perception of sovereignty in traditional theories of integration: functionalism, neo-functionalism and federalism. These approaches assume that European integration limits the sovereignty of its member states, eventually leading to its abolishment and replacement by a new political entity. The second part of this article presents the position of intergovernmental theories: realism, the classical intergovernmental approach, and intergovernmental liberalism. These approaches promote the view that states retain sovereignty in the process of European integration and that the process itself is an expression of *exercising* rather than *limiting* sovereignty. The third part is devoted to the perception of sovereignty in the multi-level governance approach, which in turn assumes that sovereignty is partially exercised by the state and partially by EU institutions. In its fourth part the article discusses the perception of sovereignty in constructivism, which within the field of European studies sometimes takes the form of sociological and historical institutionalism. These currents emphasise the importance of identity as well as the cultural and ideational foundations of sovereignty. Sovereignty requires constant upkeep and never attains a final form. In the European Union, multi-level loyalty is possible. The fifth part presents the position towards state sovereignty expressed in the judgements of the Polish Constitutional Tribunal and examines the extent to which the Tribunal's position accords with the various theories of European integration.

1. Traditional theories of integration

Sovereignty was a central issue in the early theories of European integration. According to the father of the functional approach, David Mitrany, a political community is the sum of the functions or tasks performed by its members. The main threat to this community is national sovereignty and its resulting influence leading to anarchy in the international system. Sovereignty is a legal concept describing a status which

states could not give up without relinquishing their political rights. The relation between authority and territory, which is at the core of sovereignty, should be replaced by a functional relation in the individual fields of human activity. Instead of asking what the entitled authority is and who exercises sovereignty, we should be asking: over what subjects (i.e. in what spheres) should it be exercised and what are the appropriate goals and measures suitable for exercising it? Authority will be born from the execution of joint tasks and its scope will be legitimised by these tasks, rather than through having the 'right' to it.

In the functionalist perspective, states do not lose sovereignty, interpreted as the legal entitlement to act – instead state sovereignty becomes unimportant and insignificant. As one of the scholars of this subject put it, 'functionalism looks to the creation of a new world order in which the sovereign state takes a back seat'.[1] A dense network of transnational agencies and actions will gradually overcome the past political divisions and integrate the diverse societies. The assignment of certain tasks also involves transferring that portion of sovereignty necessary for performing these tasks, and over time will result in a shift in its location.[2]

According to Mitrany, historically changes of sovereignty were violent, taking place through conquest or revolution. At the same time, there was a gradual process of transferring sovereignty in both the internal sphere, when it was transferred from absolutist monarchs to parliaments representing societies, and the external sphere, when sovereignty was transferred to, for example, the British colonies which gained independence. The transfer of sovereignty was the result of political development and the fulfilment of social needs.[3] At the same time, the content of sovereignty was changing as well. It was different in absolutist states and different in democratic ones. The final stage will be the establishment of a functional international organisation that will effectively fulfil the needs of individual people. This will contribute to the gradual disappearance of sovereign states and to overcoming the anarchy of the international system.

Mitrany further observed that a transnational community can only emerge on the global level, not on the European or another regional one. The difference lies not only in the scale, but also in the nature of the community: one is established in the old way on a certain territory, which leads to a division into those who are alien and those who are not, while

[1] Ch. Brown, *Understanding International Relations*, New York 2001, p. 136. See also: P. Taylor, *Functionalism. The Theory of David Mitrany* in: *Frameworks for International Cooperation*, A.J.R. Gordon and P. Taylor (eds.), London 1990, p. 126.

[2] D. Mitrany, *A Working Peace System*, Chicago 1966, p. 31.

[3] D. Mitrany, *The Functional Theory of Politics*, London 1975, p. 127.

the other one takes place through transferring power to functional bodies and leads to full unification.[4] The European Economic Community was based on the principles of territoriality; it strengthened the state structures that executed the decisions made on the Community level and its competences were too broad. Hence, it became the instrument for the strongest countries to pursue their interests and impose their will on weaker states. The situation was quite different with the European Coal and Steel Community and with Euratom, as their competences were rather limited.

Neo-functionalism draws upon the principles of functionalism and represents the view that, as a consequence of the gradual process of loyalty shift, sovereignty is transferred to the supranational level and European identity replaces national identity. 'The end product of the process is a world federation emerging from an indefinite number of task-oriented agencies that overlie the sovereign state and detach man's loyalty from it'.[5] The task of European studies should be to explain why states should join each other and agree to give up their attributes of sovereignty.[6]

As a consequence of political integration, nations make decisions jointly or delegate the necessary competences to supranational institutions. Actors transfer their expectations to these institutions, which should be capable of initiating social processes and therefore need to have much broader competences than those held by traditional international organisations. States should consider the operation of these institutions to be in their own interest. Pluralist social structures, a high level of development, as well as cultural and ideological proximity create an environment that facilitates integration.[7]

Ernst Haas's traditional neo-functionalism did not appreciate the role of law in the process of European integration, assuming that its function was secondary to the role of the political process. Only in the 1990s did 'legal-neofunctionalists' such as Anne-Marie Burley, Walter Mattli and Anne-Marie Slaughter offer deliberations on the role of legal actors in integration theory, pointing out that the case law created by the European Court of Justice was not always consistent with the intentions of the Member States. By entangling the Member States in a dense web of

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[4] D. Mitrany, *The Progress of International Government*, London 1933, p. 116.

[5] E.B. Haas, *Beyond the Nation State. Functionalism and International Organization*, Stanford 1964, p. 22.

[6] E.B. Haas, *The Study of Regional Integration. Reflections on the Joy and Anguish of Pretheorizing* in: *Regional Integration. Theory and Research*, L. Lindberg and S. Scheingold (eds.), Cambridge 1971, p. 6.

[7] L.N. Lindberg, *The Political Dynamics of European Economic Integration*, Stanford 1963, pp. 7–8.

legal rules, the ECJ was making the process of European integration ir-revocable.[8] On the one hand, contemporary neo-functionalists try to ex-plain the readiness of the Member States to transfer their sovereignty to the European level,[9] but on the other hand, they note the influence of a 'sovereignty-consciousness' – a result of national identity, tradition and ideology – which prevents states from delegating sovereignty to the su-pranational level.[10]

In contrast to Haas, Karl Deutsch had a different approach to sov-ereignty. He believed that states are the foundation of the international system, but that their sovereignty is never complete; it is subject to grada-tion. On one hand, states can be only formally sovereign, while not hav-ing any actual autonomy, and on the other hand formally non-sovereign communities such as ethnic minorities can be independent and enjoy le-gal protection.[11]

Deutsch differentiated between legal sovereignty, which is unitary, and political sovereignty, which is subject to gradation. States can inte-grate with each other without transferring their sovereignty to a suprana-tional organisation. Integration itself is the result of cultural assimilation and changes in mentality precede institutional and political change in the form of formal unification. The establishment of a community depends on the existence of ties of friendship, trust and loyalty, which lead to not-ing and respecting each other's needs and to cooperation in the decision-making process. European countries share the same values and adhere to them in their relations between each other, thus creating a pluralist community of security.[12]

Federalism takes a critical approach to the function held by state sov-ereignty. Already in the interwar period, there were opinions that it was not nationalism or ideological conflict between states that caused wars, but instead the very existence of sovereign states, jealously guarding their

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[8] A.-M. Burley and W. Mattli, *Europe before the Court. A Political Theory of Legal In-tegration*, "International Organization", Vol. 47(1)/1993, pp. 41–76; W. Mattli and A.-M. Slaughter, *Revisiting the European Court of Justice*, „International Organization", Vol. 52(1)/1998, pp. 177–209.

[9] G. de Búrca, *Rethinking Law in Neofunctionalist Theory*, "Journal of European Public Policy", Vol. 12(2)/2005, pp. 310–326.

[10] A. Niemann and Ph.C. Schmitter, *Neofunctionalism* in: *European Integration Theory*, A. Wiener and T. Dietz (eds.), Oxford 2009, pp. 55–56. For more, see: A. Niemann, *Ex-plaining Decisions in the European Union*, Cambridge 2006.

[11] K.W. Deutsch, *Nationalism and Social Communication. An Inquiry into the Foundations of Nationality*, 2nd ed., Cambridge 1966, pp.79–80.

[12] K.W. Deutsch et al., *Political Community and the North Atlantic Area*, Princeton 1957, pp. 46–69.

sovereignty.[13] In their well-known manifesto, Altiero Spinelli and Ernesto Rossi pointed out that national sovereignty stimulated progress, as it had helped overcome parochialism, created a broader sense of solidarity, as well as introduced developed social institutions and the free movement of persons and goods. But it had also caused imperialism, wars and totalitarianism. Sovereign states strive to dominate and subdue their citizens and limit their freedom, paying no heed to the suffering this causes. Lasting peace can be ensured only through abolishing state sovereignty and establishing a European federation.[14]

From the point of view of federalists, Jean Monnet's strategy, of taking small steps which will lead Europeans consider federation as a natural consequence, was wrong. The spontaneous transition from quantity to quality predicted by neo-functionalists will not happen. Instead, we should rather be striving towards establishing a political authority on the European level. A constitutional assembly, appointed in direct elections, should adopt a European constitution, which would subsequently be endorsed in a referendum.[15] A European federation needs to be a political community holding effective control over assistance measures, having a decision-making centre tasked with allocating assets, and being the entity that the majority of the society politically identifies with.[16]

Some scholars perceive sovereignty as located on both the federal level and in the member states, which together make up the sovereignty of the federal state. Others believe that sovereignty cannot be divided, that either a single state has absolute sovereignty or a group of states has sovereignty, each over its own territory. When a federal state is established, sovereignty is transferred to federal institutions and the member states retain competences only in the field of their internal policies. Relations within a federation are regulated by constitutional and not international law.

The difference between the notions of confederation (a union of states) and federation lies in the location of sovereignty. A confederation is made up of sovereign states and the relations between them are regulated by international law, while a federation is a sovereign state as a whole, its

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[13] P. Kerr, *Pacifism is Not Enough Nor Patriotism Either*, Burge Memorial Lecture, 28.05.1935.

[14] A. Spinelli and E. Rossi, *For a Free and United Europe. A Draft Manifesto*, The Altiero Spinelli Institute for Federalist Studies, Italy 1988, available at: www.istitutospinelli.org/documenti/doc_download/25-the-ventotene-manifesto (last visited 05.09.2014).

[15] A. Spinelli, *European Union and the Resistance*, "Government and Opposition", April–July 1967, pp. 321–329.

[16] A. Etzioni, *Political Unification. A Comparative Study of Leaders and Forces*, New York 1965, p. 4.

constituents being regions, and the relations between the regions are governed by the state constitution.[17]

Critics believe that a complete ousting of the nation state from European politics is a pipe dream. They further point out that federalism proposes replacing the nation state with a federal structure having all the hallmarks of a state, but one which institutionalises disputes resulting from territoriality instead of eliminating them. However, after ratification of the Single European Act in 1987 scholars once again began to recognise the usefulness of federal ideas in explaining European integration.[18]

2. Intergovernmental approaches

Intergovernmental approaches perceive state sovereignty in the European Union differently. These approaches draw upon realism in international relations, in which actors are defined according to the criterion of sovereignty: recognition of statehood and control held over a given territory and population.

In the opinion of Hans J. Morgenthau, the leading representative of realism, sovereignty is the highest power of the nation over the making and implementation of law in a certain territory. This means independence from the authority of a different nation, it constantly reproduces itself in the same form and does not transform into anything else.[19] The location of sovereignty depends on the extent to which a national government is controlled by foreign states, i.e. on who has effective governance power over a given territory. The location of sovereignty is subject to political evaluation and legal interpretation. At the same time, sovereignty is indivisible, which implies that sovereignty over a specific territory cannot be exercised by two different bodies at the same time. Membership in an international organisation does not mean that a state renounces sovereignty, but that it accepts that its freedom of action is restricted.[20]

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[17] J. Barcz, *Pojęcie suwerenności w świetle współzależności między sferą ponadnarodową i państwową* (*The Concept of Sovereignty in the Light of Co-Dependency Between the Supranational and National Sphere*) in: *Suwerenność i ponadnarodowość a integracja europejska* (*Sovereignty and Supranationality in the Context of European Integration*), J. Kranz (ed.), Warszawa 2006, pp. 56–57.

[18] M. Burgess, *Federalism* in: *European Integration Theory*, op.cit., pp. 25–26.

[19] H.J. Morgenthau, *The Problem of Sovereignty Reconsidered*, "Columbia Law Review", Vol. 48(3)/1948, p. 345.

[20] H.J. Morgenthau, *Politics Among Nations. The Struggle for Power and Peace*, 6th ed., New York 1978, pp. 335–340.

Realists believe that European integration is the result of the actions of states and does not change the nature of the territorial character of sovereignty. Rather, it concerns those areas of politics that do not belong to the field of national sovereignty. The European Union does not have separate sovereignty, it benefits from the sovereignty of the major Member States – France and Germany – and is a form of domination of strong states over the weaker ones. Integration can be justified by the fact that a more integrated European Union, understood as an international organisation, better serves the national interests of the Member States.

Some realists also proffer the opinion that, as a consequence of the emergence of moral norms and a global community, the sovereignty of the nation state is weakened.[21] Hans Morgenthau also claimed that the state was neither the only nor the ultimate form of political society. It is not improbable that the nation state will disappear and be replaced by greater units of a different nature, which will be more adequate to the contemporary technological circumstances and moral requirements. Nor is it improbable that some supranational political organisation will emerge, a sort of world government which would constitute the world's response to the challenges of the present times.[22]

In the opinion of Stanley Hofmann, a representative of the classic intergovernmental approach, leaders consider it their task to strengthen nationality, protect the state and execute its mission. In the process of European integration, the sovereignty of nation states has been weakened, but not completely eliminated. Integration does not take place in the sphere of 'high politics', which directly concerns sovereignty, security and national identity, but only in the sphere of 'low politics', which concerns economic and technocratic issues. It is the state leaders' task to protect the national interest and develop the national identity. States strive to have their culture exert as great an influence on the common identity as possible.[23]

Scholars who applied the intergovernmental approach believed that despite not being the optimal solution in economic and administrative terms, the nation state nevertheless remained the principal form of social organisation. Alan S. Milward went so far as to claim that the modern

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[21] E.H. Carr, *Nationalism and After*, London 1945, p. 43. For more, see: W. Scheuerman, *The (Classical) Realist Vision of Global Reform*, "International Theory", Vol. 2(2)/2010, pp. 246–282.

[22] H.J. Morgenthau, *The Intellectual and Political Functions of Theory* in: *International Theory. Critical Investigations*, J. Der Derian (ed.), Basingstoke 1995, p. 50.

[23] S. Hoffmann, *Obstinate or Obsolete? The Fate of the Nation-State in the Case of Western Europe*, "Deadalus", Vol. 95(3)/1966, pp. 862–915.

European countries would not have survived had they not transferred a part of their sovereignty to the European Union. The essence of European integration is strengthening the sovereignty of the nation state while effectively solving problems in the fields of economy and security. The process of formation and evolution of the European Community is a response to the weaknesses of the nation state as an organisational concept. Integration does not lead to the establishment of a different form of government that would replace the nation state, but instead is an act of national will aimed at strengthening the state for its own purposes.[24] States transfer a part of their sovereignty in the field of economy to the European Union in order to have their political and security interests realised more effectively. At the same time, they define the extent of their own sovereignty and are very cautious about transferring parts of it to common institutions.[25]

One of the approaches that recognises the supremacy of state sovereignty is intergovernmental liberalism. It departs, however, from the realist vision of the state as a billiard ball or a 'black box'. What is actually important is what is inside the state. According to Andrew Moravcsik, the society is the real sovereign and the state is the agent executing its will. By jointly exercising their sovereignty and delegating competences to non-governmental bodies, states demonstrate their credibility and protect themselves from internal political upheaval and attacks by the opposition. Governments transfer sovereignty to international institutions when they want to achieve additional benefits which they are unable to achieve on their own. The delegation of sovereignty ties the hands of future governments, therefore the policy gains additional credibility.[26]

The fact that the European Union performs functions that once were performed by states does not imply by itself that the EU has become sovereign and the states less sovereign. The Union joins and divides sovereignty, but does not transfer it to a higher level.[27] European integration consisted

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[24] A.S. Milward, *The European Rescue of Nation State*, London 1992, pp. 2–3, 18.

[25] A.S. Milward, *Conclusions. The Value of History* in: *The Frontier of National Sovereignty*, A.S. Milward et al. (eds.), London–New York 1994, pp. 182–201.

[26] A. Moravcsik, *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht*, Ithaca 1998, p. 9. Moravcsik writes: 'Sovereignty is <u>pooled</u> when governments agree to decide future matters by voting procedures other than unanimity [...]. Sovereignty is delegated when supranational actors are permitted to take certain autonomous decisions, without an intervening vote or unilateral veto' (p. 67). See also: R. Trzaskowski, *Dynamika reformy systemu podejmowania decyzji w Unii Europejskiej* (*The Dynamics of Reform of the Decision-Making System in the European Union*), Warszawa 2005, p. 32.

[27] R.O. Keohane and S. Hoffmann, *Institutional Change in Europe in the 1980s* in: *The New European Community. Decision Making and Institutional Change*, R.O. Keohane and

in gaining access to and controlling invisible assets, and not in transferring sovereignty to the supranational level. As a result, individuals gain specific assets without becoming their sovereign owners.[28] The European Union is a type of international regime designed and created by the Member States in order to manage their economic interdependence. Every decision on joining the international regime requires sacrificing a part of state autonomy and taking a political risk in exchange for specific benefits.

Only states have the ability to initiate integration and retain complete control over the process. The authority of supranational institutions is the result of the conscious delegation of competences by the states, and not of some autonomous power arising within these institutions. EU institutions support state leaders in their relations with internal social groups and give stronger legitimacy to government policies. In the long term, their actions serve the interests of the major Member States.[29]

3. Multi-level governance

While the intergovernmental approach assumes the preservation and strengthening of the state in the process of European integration, and the supranational approach assumes that the state will die out and be reconstructed on a higher level, the multi-level governance approach assumes that the state will be transformed. As a result, multi-level governance places the state at the centre of analysis and does not openly undermine sovereignty. In this model, sovereignty concerns not only the formal power of making law, but also its sources, such as information, knowledge and legitimisation. Power is understood as the ability to achieve desired results, which makes it easier to obtain acceptance for transferring competences to the EU level.[30] The European Union creates a network of states, EU institutions, and non-state actors. There is no single sovereign centre of power; governance takes place within polycentric and multi-level networks which join and divide sovereignty, but do not transfer it to the supranational level.

Multi-level governance concerns the interaction of political actors on different levels, with each of these levels being characterised by a different

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S. Hoffmann (eds.), Boulder 1991, p. 13.

[28] F.V. Kratochwil, *Sovereignty as Dominium. Is There a Right of Humanitarian Intervention* in: *Beyond Westphalia? State Sovereignty and International Intervention*, G.M. Lyons and M. Mastanduno (eds.), Baltimore–London 1995, p. 28.

[29] M.A. Pollack, *Delegation, Agency and Agenda-Setting in the Treaty of Amsterdam*, "European Integration Online Papers", Vol. 3(6)/1999, p. 11.

[30] L. Hoogh and G. Marks, *Multi-level Governance and European Integration*, London 2001, pp. 5–6.

kind of rationality, a different function and different types of decision-making. At the same time, in contrast to a federation, the main emphasis is on states, which remain the main actors in international relations. Governance takes place between, not above, states. The geographical borders between them become insignificant, but authority and the related border control are located at several levels. The European Union is, therefore, analogous to a state, but it creates a political system of its own kind, in which there is no single formal government.[31]

The dynamics of interactions in the multi-level governance system ensures the continuation of sovereign identity, even though this is seemingly contradictory to the structures of the system. The structures of such governance influence the identity of states, and statehood is defined and strengthened by membership in the European Union. European states retain their sovereign identities due to a constant discourse on sovereignty. The assumption that 'more Europeanised' means 'less sovereign' is wrong, because the degree of Europeanisation is by no means inversely proportional to the degree of sovereignty.[32] Hence, paradoxically, the multi-level governance system is based on the notion of statehood, even when it opposes reforms aimed at the introduction of a model analogous to the traditional nation state.[33]

Scholars who analyse the European Union from the angle of multi-level governance mostly focus on actual power rather than on formal competences. They consider sovereignty the key element of statehood, although they also reject the Weberian minimalist perception of it as the exclusive entitlement to the legal use of force. This would mean that the Member States maintain their full sovereignty only when they retain a monopoly on the legal use of force on their territories. Although states indeed control their societies using coercive measures, this does not mean that nothing changes in the context of their sovereignty as a consequence of European integration. A proper analysis of sovereignty also requires taking into account the political and economic sanctions that the European Union can

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[31] For more, see: J. Czaputowicz, *Rola państwa w Unii Europejskiej (The Role of State in the European Union)*, Centrum Europejskie Natolin, EUI Research Laboratory, Issue 11, Warszawa 2004, pp. 48–51, available at:

www.natolin.edu.pl/pdf/zeszyty/NatolinZeszyt11_Czaputowicz.pdf (last visited 07.09.2014).

[32] L. Hooghe and G. Marks, *Multi-Level Governance and European Integration*, Lanham 2001, p. 16.

[33] J. Shaw and A. Wiener, *The Paradox of 'European Polity'* in: *The State of the European Union*, Vol. 5: *Risks, Resistance and Revival*, M. Green Cowles and M. Smith (eds.), Oxford 2000, p. 65.

impose to influence its Member States. Sovereignty should not be defined according to formal and legal criteria; rather attention should be focused on actual sources of power, such as knowledge, information and expertise. The element that defines sovereignty is rather political control, and the Member States do not have this power in those areas in which decisions are made at the EU level.[34] Critics claim that the multi-level governance approach focuses on the process while ignoring the ultimate goal of integration and fails to sufficiently appreciate the influence of states.

4. Constructivism

Constructivists believe that sovereignty is a socially-constructed institution of the international community. It essentially comes down to the general recognition of the rights of other entities to hold exclusive authority over a certain territory. The institution of sovereignty creates the social conditions for autonomy and individuality. The mutual recognition of sovereignty by states confirms their ownership rights to a specific territory, and thus strengthens them in relation to non-state actors. This has led, contrary to the way neo-functionalists would have it, to a spatial instead of functional organisation of political life. As a result, political life does not revolve around types of activity divided into sectors, but into two spheres – the domestic and the international.[35]

States institutionalise sovereignty when they treat each other as sovereign. Sovereignty never reaches an ultimate form, it never really 'is', but rather constantly 'is becoming'.[36] It does not have pre-determined qualities and exists only in the social context, in relation to other entities, which also have specific identities, related to their role, in the form of shared expectations and a similar perception of reality. Identity is not only a matter of choice – it is imposed on states and culturally consolidated. The identity of states depends on the function they fulfil in their relations with other states.[37] This leads us to the conclusion that the sovereignty of individual states in the European Union differs depending on the place they hold in the hierarchy and their function in the EU system. For example, the sovereignty of Germany will be different than

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[34] L. Hooghe and G. Marks, op.cit., pp. 5–8.

[35] For more, see: Ch. Reus-Smit, *The Moral Purpose of the State. Culture, Social Identity, and Institutional Rationality in International Relations*, Princeton 1999.

[36] E. Adler, *Seizing the Middle Ground. Constructivism in World Politics*, "European Journal of International Relations", Vol. 3(3)/1997, pp. 322–323.

[37] A. Wendt, *Społeczna teoria stosunków międzynarodowych (Social Theory of International Relations)*, transl. by W. Derczyński, Warszawa 2008, pp. 211–223.

the sovereignty of Poland, which in turn will be different from the sovereignty of Lithuania.

Tanja Aalberts attempts to find a common plane of cooperation between multi-level governance and social constructivism by analysing the conditions of sovereign statehood in the European Union. If we consider the existence of sovereign statehood as a descriptive concept, multi-level governance perceives sovereignty in positivist terms. Meanwhile, the idea of traditional sovereignty is hard to reconcile with the division of power and overlapping competences. These two positions can be reconciled by the constructivist approach, using the ideas of deliberative sovereignty and the identity of states. This approach assumes that the international reality is founded on both material and ideational grounds, the influence of which is limited in both time and space. From the point of view of constructivism, multi-level governance is an intersubjective structure and an example of the emergence of new identities.[38]

Alexander Wendt initially claimed that sovereign states would remain the main actors of international politics in the foreseeable future. They jealously guard their sovereignty and any introduction of a new structure of authority will only be done through states.[39] Among constructivists one may also find opinions that the organisation of political life based on sovereignty and territorial exclusivity was only possible at a specific stage of mankind's development.[40] Nowadays, sovereignty is threatened, not because states face challenges to their exclusive authority posed by other states, but because these challenges are posed by non-state entities.

In European studies, constructivism is drawn upon by sociological and historical institutionalism. These currents assume that the social reality is influenced by norms, ideas and values. They accept the role of state governments in European integration, especially at the stage of initiation, while recognizing the fundamental importance of supranational institutions at subsequent stages. They reject the zero-one approach, claiming that the carrier of sovereignty may be either the state (as assumed by intergovernmental liberalism) or the supranational community (as assumed by neo-functionalism). They assume that different roles and identities dominate in different situations and allow for multi-level loyalty and for

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[38] T.E. Aalberts, *The Future of Sovereignty in Multilevel Governance Europe – A Constructivist Reading*, "Journal of Common Market Studies", Vol. 42(1)/2004, p. 40.

[39] A. Wendt, *Anarchy is What the States Make of It. The Social Construction of Power Politics*, "International Organization", No. 46/1992, p. 385.

[40] A.B. Murphy, *The Sovereign State System as Political-Territorial Ideal. Historical and Contemporary Considerations* in: *State Sovereignty as Social Construct*, T.J. Biersteker and C. Weber (eds.), Cambridge 1996, p. 91.

having many identities at the same time. It may happen in the process of integration that some actors do not accept further restrictions of national prerogatives, while others do not agree to taking steps back from the degree of integration already achieved.[41]

Sociological institutionalism does not attach much weight to the notion of state sovereignty and claims that states strive to express their identity, which is a product of intersubjective structures and interactions, rather than maximise their interests. States take actions in accordance with the logic of appropriateness and not the logic of consequence, and try to do what they consider appropriate.[42] Institutions have the potential of forming and transforming the mentality and, consequently, the identity of actors, as well as changing the logic of action, for example from calculation of expected benefits to observance of the rules. The European Union is an evolving political community kept together by the force of a normative consensus.[43]

In turn, scholars who take the approach of historical institutionalism maintain that historical analysis yields a fuller understanding of European integration as a process over which the Member States are losing control. While neo-functionalists believe that group behaviour and specific results are determined by the social, psychological and cultural properties of individuals, historical institutionalists claim that they are determined by institutions. Institutions influence the process of decision-making and contribute to ensuring stability and maintaining the balance of power. Institutional arrangements make it difficult and very costly to step off the chosen path. The state is not a neutral mediator between competing interests, but a sophisticated institutional complex able to both create and resolve group conflicts.[44]

Historical institutionalism also claims that sovereignty is in fact not the main concern of national governments; they are more focused on how to create the right conditions for achieving a quick political success. As a result, leaders focus on the immediate consequences of their decisions. Decision-makers have a limited time horizon and are unable either to envision or prevent the unintended consequences of their actions.

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[41] M. Egeberg, *Transcending Intergovernmentalism? Identity and Role Perceptions of National Officials in EU Decision-Making*, "Journal of Public Policy", Vol. 6(3)/1999, pp. 470–471.

[42] J. March and J.P. Olsen, *Democratic Governance*, New York 1995, p. 30.

[43] M.A. Pollack, *The New Institutionalism and EC Governance. The Promise and Limits of Institutional Analysis*, "Governance", Vol. 9(4)/1996, p. 432.

[44] P.A. Hall and R.C.R. Taylor, *Political science and the three new institutionalisms*, "Political Studies", Vol. 44(4)/1996, pp. 937–938.

The choice of possible actions is restricted by previous decisions, which States often would not have made if they had had the information available to them then that they gain later. In the end, states have lost control over the process of European integration and institutions have gained autonomous capabilities of taking actions.[45]

It seems that the weakness of historical and sociological institutionalism is the consequence of ascribing specific behaviours to states without taking into account their type or power. In fact, some countries strengthen their control over the process of European integration, which develops in accordance with their interests, while others lose control over it and become dependent.

5. Sovereignty in the judgements of the Polish Constitutional Tribunal

Here it seems appropriate to ask: What differences are there in the understanding of sovereignty between the Polish Constitutional Tribunal (PCT) and the constitutional courts of other countries, and to what extent does the PCT agree with the various theories of European integration?

While answering these questions, it should be stressed that the constitutions of European countries which were adopted after World War II provided for the possibility of transferring sovereignty for the purpose of ensuring international peace. According to the French constitutional doctrine, membership in the European Union does not deprive France of sovereignty. The Preamble to the French Constitution of 27 October 1946 states that 'subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organisation and preservation of peace'. The fact that France has indeed retained its sovereignty is reflected in its right to make constitutional laws, and the referendums in which the French accepted the various stages of European integration is a direct expression of this sovereignty.[46] The adoption of the Treaty of Lisbon, however, required that the constitution had to be changed to include a passage stating that the French Republic 'shall participate in the European Union on the conditions provided for by the Treaty of Lisbon'.

Germany recognises the primacy of Community law over constitutional law, but with due regard for the principle of subsidiarity.

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[45] P. Pierson, *The Path to European Integration. A Historical-Institutionalist Analysis* in: *European Integration…*, op.cit., pp. 29–31.

[46] J. Ziller, *Sovereignty in France. Getting Rid of the Mal de Bodin* in: *Sovereignty in Transition*, N. Walker (ed.), Oxford 2003, pp. 261–277.

The German constitution allows for the transfer of sovereign powers to the European Union under the condition that German constitutional law and the principle of subsidiarity are respected. Pursuant to the judgement of the Federal Constitutional Court of Germany of June 2009, the European Union is an international organisation established by sovereign states that have not given up their sovereignty. Membership in the European Union cannot lead to Germany being deprived of statehood through an uncontrolled and spontaneous expansion of EU competences. The Court confirmed that the final decision lay with the bodies established under the German constitution.[47]

In the United Kingdom, the sovereignty of the Parliament was restricted by the European Communities Act of 1972 and the doctrine of primacy of Community law, which was later confirmed by judgments of courts. However, section 18 of the European Union Act 2011, considered a 'sovereignty' clause, states that directly applicable or directly effective EU law shall be recognised in UK law only by virtue of an Act of Parliament. This means that the Parliament has to consent to the primacy of EU law over British law in each instance separately. This is to prevent the Parliament's sovereignty from being limited by the judgements of courts and to support judges in their actions aimed at protecting the sovereignty of British law.

The constitutions of most Central European countries usually contain provisions addressing the protection of sovereignty and independence, the ethnically defined nation state, and self-determination. They also differentiate between independence and sovereignty and allow for partial delegation of sovereignty (the internal dimension) but not derogation of independence (the external dimension). This conservative approach can be explained by the fact that the countries of Central Europe regained independence only after the end of the Cold War and thus are more sensitive about preserving sovereignty and the related rhetoric.[48]

The Preamble to the Constitution of the Republic of Poland states that in 1989 Poland regained 'the possibility of a sovereign and democratic determination of its fate'. At the same time, the Constitution allows for transferring the state's competences under certain circumstances to the European Union. Under Article 90, Poland may delegate the competences of organs of state authority to an international organisation, and under

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[47] Ch. Wohlfahrt, *The Lisbon Case. A Critical Summary*, "German Law Journal", Vol. 10(8)/2009, pp. 1277–1286.

[48] A. Albi, *Postmodern versus Retrospective Sovereignty. Two Different Discourses in the EU and the Candidate Countries* in: *Sovereignty in Transition*, op.cit., pp. 401–421; and A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge 2005, pp. 18–36.

Article 91, international agreements are applied directly and constitute part of the domestic legal order.[49]

The doctrine of Polish constitutional law is dominated by the view that membership in the European Union does not infringe on sovereignty as such, but influences who has the competence to exercise it.[50] In May 2005, the Polish Constitutional Tribunal ruled that the accession treaty concluded between Poland and the European Union was not at variance with the Polish Constitution. At the same time, the Tribunal ruled that the legal system in Poland would have a multi-aspect nature as there would be two binding elements of the legal order: the national law and the Community law, the latter established with the participation of representatives of the Polish authorities in the Council of the European Union as well as the Polish citizens and their representatives in the European Parliament. Both legal systems should coexist under the principle of mutually favourable interpretation. Poland's sovereignty is confirmed by the rule that in the event of a conflict between EU law and Polish constitutional law, the constitution is the highest law in force in Poland.[51]

On the other hand, in its judgement of 24 November 2010, the Constitutional Tribunal recognised that the notion of sovereignty is subject to transformations in response to the changes that have been taking place in recent times, such as democratisation of the decision-making process, the development of human rights, the rising importance of international law, as well as institutionalisation of the international community. Sovereignty is no longer understood as the state's freedom of action or its unlimited ability to exert influence on other states. At the same time, in the Tribunal's opinion the provisions of the Treaty of Lisbon do not infringe on the Polish Constitution and transferring competences to the EU level does not imply transferring sovereignty to this organisation. Waiving the right to autonomous legislative decision-making is not irrevocable and does not lead to a permanent limitation of sovereign rights.[52]

Furthermore, the Tribunal ruled that the principle of maintaining sovereignty requires that the process of European integration be conducted with respect for the boundaries of transferred competences.[53]

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[49] The Constitution of the Republic of Poland of 2nd April, 1997, as published in *Dziennik Ustaw* No. 78, item 483, available at: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (last visited: 26.01.2015).

[50] C. Mik, *Sovereignty and European Integration in Poland* in: *Sovereignty in Transition*, op.cit., p. 398.

[51] Judgement of 11.05.2005, Constitutional Tribunal, 49/5/A/2005, K 18/04, pp. 44–45.

[52] Ibidem.

[53] For more on the principle of maintaining sovereignty, see: P. Winczorek, *Konstytucja*

In particular, the competences that make up the core of sovereignty – such as establishing constitutional rules and the state's authority over its territory, armed forces, police and judiciary – may not be transferred to the EU. Observance of the constitutional principle of facilitating the process of European integration may not lead to violation of the principle of maintaining sovereignty.[54]

The Tribunal also noted that any limitation on the ability to exercise state sovereignty in the process of European integration is compensated by the right to participate in the EU's decision-making process. The fact that the Member States grant competences to the European Union actually confirms their sovereignty in relation to the EU, and since the EU may not exceed the competences it has been granted, its activities strengthen the sovereignty of the Member States.[55]

Some experts in constitutional law criticise the Constitutional Tribunal's decision to join that group of Member States' constitutional courts which glorify state sovereignty and take a restrained position towards European integration. These scholars note the more flexible position of the Czech constitutional court, which has rejected the view that sovereignty was indivisible and permitted some of it to be delegated to the European Union and exercised jointly.[56]

The Polish Constitutional Tribunal, just as the constitutional courts of other Member States, accepts neither the functionalist view that state sovereignty is a barrier to effective performance, nor the neo-functionalist view that sovereignty – and in consequence also the loyalty of the citizens – is 'transferred' to the supranational level. The Constitutional Tribunal would also not agree with the position of federalists who blame state sovereignty for wars. The Tribunal considers sovereignty an essential value that was regained in 1989 and that may not be squandered. At the same time, it defines sovereignty according to formal and legal criteria. As a result, the Tribunal would neither accept the federalist idea of transferring sovereignty to the supranational level, nor the view of the proponents of multi-level governance that it be divided between the state level and the EU level.

RP a prawo wspólnotowe (*The RP Constitution and Community Law*), "Państwo i Prawo", Vol. 59(11)/2004, pp. 3–17.

[54] Judgement of 24.11.2010, Constitutional Tribunal, 108/9/A/2010, K 32/09.

[55] Ibidem, p. 23.

[56] See: T.T. Koncewicz, *Trybunał Konstytucyjny wobec prawa europejskiego* (*The Constitutional Tribunal and European Law*) (Part I), "Przegląd Sejmowy", No. 2(109)/2012, pp. 104–134; T.T. Koncewicz, *Trybunał Konstytucyjny wobec prawa europejskiego* (*The Constitutional Tribunal and European Law*) (Part II), "Przegląd Sejmowy", No. 3(110)/2012, pp. 125–159.

The Tribunal would also not agree with the opinion of transactionalists that sovereignty is never complete, is subject to gradation, and that states can be formally sovereign while having little political sovereignty. In addition the Tribunal's understanding of sovereignty as a definitional property of the state would not allow the claim that, for example, the sovereignty of some states (e.g. Germany) can be greater than the sovereignty of others (e.g. Greece). Moreover, the Tribunal would not accept the view of constructivists, claiming that states retain their sovereign identity owing to constant sovereignty discourse. States do not transfer sovereignty to the European Union, only the competences to exercise it. Consequently, states do not lose their sovereignty and thus do not need to maintain it via practice or discourse.

The Tribunal seems to understand sovereignty in a manner similar to the way realists perceive it. Membership in the European Union as well as membership in other international organisations does not imply giving up sovereignty, but rather accepting restrictions to the state's freedom to act. Sovereignty is indivisible, which means that it cannot be exercised by two different entities at the same time. Even though today the European Union performs functions which used to belong to states, it does so because this is what these states wanted and agreed to, and this does not make it sovereign.

However, like the proponents of intergovernmental liberalism, the Tribunal does not treat the state as a 'black box'. The Polish constitution declares that the nation is the sovereign and that the state should implement the nation's will. The Tribunal's view that European integration means *de facto* strengthening the sovereignty of the Member States follows the reasoning of Allain S. Milword, according to whom European integration is a response to the weakness of the European nation states, which cannot survive unless they delegate some of their competences to the European Union.

Conclusions

Scholars from the countries that joined the European Union ten years ago generally agree with the scholars from the 'old' Member States insofar as the place and role of state sovereignty in the European Union is concerned. In Central and Eastern Europe, just as it is in Western Europe, the divisions go across societies, with some citizens advocating a transfer of sovereignty to the EU level and establishing a federation, and some opting for keeping sovereignty on the national level.

Looking at the problem of state sovereignty in the European Union from the viewpoint of the theory of European integration allows us to

perceive its complexity in its entirety. In traditional theories of integration, the European Union is a variant of the political system, exemplification of a broader phenomenon of the political community, and sovereignty is transferred to the supranational level. In intergovernmental approaches, the European Union is a variant of regional integration, a case of an international regime formed by sovereign and rational states in order to institutionalise cooperation. In the concept of multi-level governance, sovereignty should not be defined according to formal and legal criteria, but instead attention should focus on the actual sources of power, such as information, knowledge and legitimacy. In constructivism, in turn, and in the related institutional theories, sovereignty is a social construct and its content depends on the predominant norms, ideas and theories.

The loss of states' sovereignty as a consequence of European integration is explained either as the effect of the states' conscious actions, motivated by the tangible benefits resulting from a greater scale of operation or from strengthening their position vis-à-vis external partners – as claimed by the representatives of intergovernmental approaches; or as a consequence of states losing control over the process of integration as a result of the influence of other actors exerted against the will of these states and/or without their consent – as the representatives of the neo-functional and institutional approaches would have it.

The Polish Constitutional Tribunal understands sovereignty in a traditional way. Sovereignty is not subject to division cannot be delegated to the European Union, and Poland's EU membership, while placing limitations on the freedom to act, does not imply a loss of sovereignty. Even though the European Union performs some similar functions to those of states, this does not mean it has become sovereign itself. The Tribunal's position is closest to the realist theories and the intergovernmental approaches advocating that states retain their sovereignty in the process of European integration. Transferring competences to the European Union is viewed as a manifestation of state sovereignty and serves to consolidate it.