

The Impact on Sovereignty

Assessing an Essentially Contested Concept

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Abstract

The impact of European institutions and legislation on national sovereignty is often asserted without a clear conceptualisation of sovereignty. This article sheds a new light on the debate over the impact of European institutions and legislation on national sovereignty and the debate over the concept of sovereignty itself. Contestants in both debates are shifting sands, as they are unaware that the essentially contested nature of sovereignty makes it impossible to have an overall accepted definition of the concept. The essentially contested nature is examined and used to argue for a more fruitful approach towards conceptualising sovereignty, namely examining its function in a particular use by a particular group of users. The proposed approach is applied to the use of sovereignty by national constitutional courts in order to give an account of the issues that might be at play when an impact of European institutions and legislation on national sovereignty is claimed.

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1. Introduction

The concept of sovereignty is often used in public debates in the European Union (EU), sometimes accompanied by doom scenarios about the dissolution of the nation-state and the end of national culture. The assertion of an impact of European institutions and legislation on national sovereignty provokes strong emotions and has far-reaching political and legal consequences.

Despite the consequences of the impact claims, it is unclear – at least for the audience – which criteria are used to underpin the asserted impact on national sovereignty. Without clarity about assessment criteria, assertions about an impact on national sovereignty seem to be nothing more than myths and ‘thought-destructive mantras’.¹

This article questions whether sovereignty can be conceptualised in order to give claims about the impact of European institutions and legislation on sovereignty more substance. It intends to bring clarity in debates over sovereignty by casting light on the nature of the concept of sovereignty and the issues that might be at play when the concept is used. Thereby, also a first step is taken towards formulating a framework for assessing the impact of European institutions and legislation on national sovereignty.

This research is motivated by the claims about an impact on national sovereignty that led to the introduction of mutual recognition in the Area of Freedom, Security and Justice (AFSJ) in the EU. Mutual recognition was introduced as a way of regulating the AFSJ, because it could boost the pace of integration post-Maastricht while it was at the same time regarded as a measure with comparatively less impact on national sovereignty than harmonisation.² However, there was, and still is, a lack of criteria to compare the impact of mutual recognition to the impact of harmonisation on national sovereignty.

In the first part of this article, it will be asked whether there is any clarity and consensus on the definition of sovereignty in the public debate. It is not a secret that sovereignty is a heavily contested concept, but if there is a definition on which contestants can agree, this definition would provide the basis for formulating the central issues that the concept deals with and, therewith, for understanding what is meant by an impact on sovereignty. The nature of the concept of sovereignty and the debate over sovereignty will be examined. This leads to the insight that the only fruitful approach towards conceptualising sovereignty is by examining what the function of sovereignty is in a particular use by a particular group of users, instead of defining what sovereignty *is*.

In the second part, the function of sovereignty is examined in its use by national constitutional courts in decisions that deal with the relation between the European and the national legal order. On the basis of this description, several issues that arise in the use of the concept are distinguished. This will help to understand the core of sovereignty claims in its use by national constitutional courts and can form a basis for assessing the impact on national sovereignty of European institutions and legislation, and in particular of mutual recognition in the AFSJ.

¹ As Jackson says, ‘core sovereignty’ concepts should be clarified in order to “help overcome some of the ‘hypocrisy’ and ‘thought-destructive mantras’ surrounding these concepts so that policymakers can focus on real problems rather than myths.” [J. H. Jackson, ‘Sovereignty-modern: a new approach to an outdated concept’, 97 *American journal of International Law* (2003) p. 782 at p. 800.]

² K. Lenaerts, ‘The Principle of Mutual Recognition in the Area of Freedom, Security and Justice’, The Fourth Annual Sir Jeremy Lever Lecture, p. 2; W. van Ballegooij, *The Nature of Mutual Recognition in European Law: Re-examining the notion from an individual rights perspective with a view to its further development in criminal justice area* (Cambridge: Intersentia, 2015), p. 161; P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (6th edn, Oxford: OUP, 2015), p. 988.

2. The Concept of Sovereignty

2.1. An Essentially Contested Concept

Defining the concept of sovereignty is an ambitious task and many have found themselves grasping at straws in their attempt, as the concept is heavily debated. The debate about sovereignty concerns the heuristic value of the concept for understanding the configuration of power and authority in today's legal and political world-order. Sovereignty developed as the 'conceptual key'³ to the Westphalian world-order in which nation-states co-exist as independent, sovereign entities. Today's world-order is changing: it is considered to have reached or, at least, to be in a process of transition towards a post-Westphalian phase.⁴ This is characterized by increased mutual dependence of nation-states – economically, politically and culturally – and the emergence of transnational political communities – the EU being a telling example.

While recourse is made to the concept of sovereignty in public debates with increasing intensity, the academic debate is moving away from the concept. The consequence is a growing discrepancy between the academic and public debate concerning the heuristic value of the concept of sovereignty. Academics have challenged the concept "as outmoded, as fragmented, as incoherent, and not least as normatively unattractive or inadequate as a way of making sense of emergent patterns of legal and political authority and imagining their future."⁵ Neil MacCormick is one of the most articulate defenders of this view that the concept of sovereignty is outdated in today's pluralistic world-order.⁶ According to MacCormick, sovereignty theory inevitably points into a monocular view on ultimate authority: either the EU is sovereign or the member states are sovereign. Instead, he sees the complex interaction of overlapping legalities in the EU as a normative system of law beyond sovereignty. As he says,

"Where at some time past there were, or may have been, sovereign states, there has now been a pooling or a fusion within the communitarian normative order of some of the states' powers of legislation, adjudication and implementation of law in relation to a wide but restricted range of subjects. Some matters fall to be handled within one normative system or normative order, while other parts remain rooted or based in other normative systems or normative orders, with arrangements designed (so far, rather successfully) to prevent incompatibility in areas of overlap. We must not envisage sovereignty as the object of some kind of zero sum game, such that the moment X loses it Y necessarily has it. Let us think of it rather more as of virginity, which can in at least some circumstances be lost to the general satisfaction without anybody else gaining it."⁷

Also less explicitly, some legal researchers feel tempted to reject or, at least, circumvent the concept. They tend to delineate their research by focussing on clearer concepts. For example, with regard to the impact of mutual recognition in the AFSJ, research is done into the constitutional implications of

³ N. Walker, *Sovereignty in transition* (Oxford: Hart Publishing, 2006), p. vi.

⁴ *Ibid.*, p. 9.

⁵ *Ibid.*, p. v.

⁶ *Ibid.*, p. 15; J. W. van Rossem, *Soevereiniteit en pluralisme* (Kluwer, 2014), p.194.

⁷ N. MacCormick, 'Beyond the Sovereign State', 56(1) *The Modern Law Review* (1993) p. 1 at p.16.

mutual recognition⁸ and the effects of mutual recognition on the role of the national judge.⁹ Although such research might be very illuminating, as long as the link to national sovereignty is not clarified, it seems removed from the public debate in which the pressing question is the impact on sovereignty. We might as well say, there is an elephant in the room.

However, there are also researchers who have attempted to enhance the value of the concept of sovereignty for capturing the configuration of today's multi-dimensional world-order, recognizing the apparent value that the concept has in public debates. New conceptions of sovereignty have been proffered, such as absolute versus limited sovereignty, and unitary versus pooled, shared or divided sovereignty.¹⁰ Also, Antonia Waltermann identifies in her contribution to this book many different conceptualisations that exist and the confusion this causes for debating sovereignty in the legal discourse.¹¹

As the conceptualisations of sovereignty have become diverse and distinct from the classical concept and there is no agreement about the relative heuristic value of each conceptualisation, the question arises whether the concept of sovereignty is an *essentially contested concept*. This term is coined by Gallie, an imminent philosopher. It refers to a group of concepts about which an assumption of agreement cannot be made. The dispute about the use of essentially contested concepts goes to the heart of their very nature.¹² They are in the definition of Gallie: "concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users."¹³

Indeed, any particular use of any concept is liable to be contested.¹⁴ But while other concepts "carry with them an assumption of agreement, as to the kind of use that is appropriate to the concept in question, between its user and anyone who contests his particular use of it,"¹⁵ essentially contested concepts do not. They are contested in their essence and should also be distinguished from radically confused concepts, for which the contestation is a result of different aims of different groups of people. These aims are not essentially contesting but "only accidentally and as a result of persistent confusion".¹⁶

Gallie provides seven criteria that concepts have to satisfy in order to be essentially contested. In the following, it will be examined whether the concept of sovereignty satisfies these criteria and if so, what the implications are for the use of the concept of sovereignty.

⁸ See, for example, M. Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?', 15(1) *European Law Journal* (2009) p. 70; V. Mitsilegas, 'The constitutional implications of mutual recognition in criminal matters in the Eu', 43 *Common Market Law Review* (2006) p. 1277.

⁹ A. Erbežnik, 'Mutual Recognition in EU Criminal Law and Its Effects on the Role of a National Judge', in N. Peršak (ed.), *Legitimacy and Trust in Criminal Law, Policy and Justice: Norms, Procedures, Outcomes* (Farnham, Burlington: Ashgate) p. 131.

¹⁰ S. Besson, 'Sovereignty in Conflict', 8(15) *European Integration online Papers* (2004), p. 8-11; B. de Witte, 'Sovereignty and European Integration: the Weight of Legal Tradition', 2 *Maastricht Journal of European and Comparative Law* (1995) p. 145 at p. 170-173.

¹¹ A. Waltermann, 'Nationale soevereiniteit als een status' in this volume, p. 25.

¹² Besson, *supra* n.12, p. 6.

¹³ W. B. Gallie, 'Essentially Contested Concepts', 56 *Proceedings of the Aristotelian Society* (1955) p.167 at p. 169.

¹⁴ *Ibid.*, p. 167.

¹⁵ *Ibid.*, p. 167.

¹⁶ *Ibid.*, p. 176.

Before examining the criteria, a brief remark is in place: the criteria might lead to confusion as they seem to assume a conceptualisation of sovereignty. For example, the fact that an essentially contested concept has an evaluative nature or a common core seems to presuppose a conceptualisation of sovereignty. This is partly true: there must be a general idea of the nature of sovereignty that ties the different conceptualisations together, for otherwise it might as well be a radically confused concept, but this does not lead to agreement on a particular conceptualisation. In fact, the concept is essentially contested because the overarching concept encompasses many different aspects that users balance differently.

(1) Appraisive or evaluative nature

Gallie's first criterion for an essentially contested concept is that it "must be *appraisive* in the sense that it signifies or accredits some kind of valued achievement."¹⁷ The concept should include and enhance tension over what is and what ought to be.¹⁸

Sovereignty has a two-layered appraisive nature: it signifies a valued achievement and the justification for this achievement comes from value judgements inherent to the concept.¹⁹

In public debates, sovereignty is interpreted as a valued achievement that has to be protected. The concept of sovereignty serves as a descriptive and normative framework to decide where sovereign power or authority lies and where it should lie.

Besides being a valued achievement, sovereignty has also an appraisive nature because the concept encompasses so-called *sovereign values*. A claim to sovereignty is associated with a claim to the ultimate power or authority to protect and maintain sovereign values within the polity and to encompass these sovereign values in relation to other sovereign entities. The sovereign values function as a justification for the exercise of sovereign powers or authority. The possession of sovereignty is not determined by the identity of a political entity, but only by the values the political entity pursues under the umbrella of sovereignty. "Understood along these lines, sovereignty is not an empirical end in itself, but should protect the different values which constitute its justification."²⁰ It might be argued that "the exercise of public powers of government can only be considered an exercise of sovereign powers when they are in accord with sovereign values, otherwise the exercise of public powers is something entirely distinct from the exercise of sovereign powers and can even be considered a violation of sovereignty."²¹

(2) Internally complex and diversely describable

According to Gallie's second and third criterion, the valued achievement must both be *internally complex* and *diversely describable*. The close connection of these two criteria becomes clear in Gallie's assessment of the essentially contested nature of 'democracy', when he observes that the concept "is internally complex in such a way that any democratic achievement (or programme)

¹⁷ Ibid., p. 171.

¹⁸ S. Koenis, *Het verlangen naar cultuur: Nederland en het einde van geloof in een moderne politiek* (Amsterdam: Van Gennep, 2008), p. 167.

¹⁹ A. Okoye, 'Theorising Corporate Social Responsibility as an Essentially Contested Concept: Is a Definition Necessary?', 89 *Journal of Business Ethics* (2009) p. 613 at p. 617.

²⁰ Besson, *supra* n.12, p. 14.

²¹ D. Sarooshi, 'The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government', 25 *Mich.J. Int'l L.* (2004) p. 1107 at p. 1115.

admits of a variety of descriptions in which its different aspects are graded in different orders of importance.”²²

The concept of sovereignty also admits a variety of descriptions and each description contains differently graded aspects, which makes it an internally complex concept. Besson²³ elucidates that three descriptions of sovereignty can be distinguished: the concept can be interpreted as a result-oriented, a problem-oriented and a normative concept.

The complexity of sovereignty as a result-oriented concept refers to the different conceptions of sovereignty that contribute to determining what sovereignty *is* as a state of affairs or achievement and whose content is extremely contestable. These conceptions include, *inter alia*, a legal and political, external and internal, absolute and limited, and unitary and pooled, shared or divided conception of sovereignty.²⁴

The complexity of sovereignty as a problem-oriented concept refers to “the different answers that can be given to the question what the best allocation of power is in each case, i.e. the different interpretations given to sovereignty *qua* outcome.”²⁵ Sovereignty is a valued achievement and as such, claims to sovereignty are also normative claims about what the allocation of power should be and how it should be reached.

The complexity of sovereignty as a normative concept refers to “the *plurality of values* and normative standards that the concept of sovereignty protects and to which it is held accountable.”²⁶ These are the above-mentioned sovereign values that constitute a justification for holding sovereignty.

(3) Open in character

The fourth criterion states that the concept should be ‘open’ in character. “The accredited achievement must be of a kind that admits of considerable modification in the light of changing circumstances; and such modification cannot be prescribed or predicted in advance.”²⁷

Sovereignty can be seen as a concept with an open character. The different conceptions and values of sovereignty have changed over time, influenced by the changes in the configuration of power and changes in values in the post-Westphalian world-order. Different conceptions of sovereignty have been developed to enhance its heuristic value, such as absolute versus limited sovereignty and unitary versus pooled, shared or divided sovereignty.²⁸ The concept has also broadened to include more and other sovereign values. In its earliest form, the concept included “statal values as exclusive control by a State of its territory and non-intervention in the internal affairs of other States.”²⁹ In the Western liberal tradition, the concept of sovereignty has broadened to contain values such as democracy, human rights, equality, freedom, legitimacy, autonomy and self-determination.³⁰

However, authors who argue that the concept has lost its explanatory value would deny the open character of the concept. For example, De Witte states, “if sovereignty is divided, it loses its distinguished trait.”³¹ As noted before, consigning the concept of sovereignty to the waste bin is in

²² Gallie, *supra* n.13, p. 184.

²³ Besson, *supra* n.12, p. 8.

²⁴ *Ibid.*, p. 8.

²⁵ *Ibid.*, p. 12.

²⁶ *Ibid.*, p. 14.

²⁷ Gallie, *supra* n.13, p. 172.

²⁸ Besson, *supra* n.10, p. 8-11; De Witte, *supra* n.10, p. 170-173.

²⁹ Sarooshi, *supra* n.21, p. 1115

³⁰ *Ibid.*, p. 1115; Besson, *supra* n.12, p. 7.

³¹ De Witte, *supra* n.12, p. 172.

discrepancy with the increasing use of the concept in public debates, which is taken as a starting point in this article.

(4) Aggressive and defensive use

According to Gallie's fifth criterion, an essentially contested concept is used both *aggressively and defensively*. Different persons or parties adhere not only to different views of the correct use of the concept, but "each party recognizes the fact that its own use of it is contested by those of other parties, and that each party must have at least some appreciation of the different criteria in the light of which the other parties claim to be applying the concept in question. More simply, to use an essentially contested concept means to use it against other users and to recognize that one's own use of it has to be maintained against these other users."³²

The defensive or aggressive use of sovereignty may not be present in each legal-political use or academic work, but it always exists within an overview of the contested use of the concept as a whole.³³ When sovereignty is interpreted as a problem-oriented or normative concept, it might be used aggressively and defensively to claim and justify power. This is exemplified by the use of the concept in the complex relationship between the EU and its member states, where the conferral of power to the EU might lead to a limitation of national sovereign powers and the concept of sovereignty is used to shape the configuration of power between the EU and its member states. In a result-oriented interpretation it is less likely that the concept is used aggressively or defensively, for in this use the concept is approached from a theoretical perspective on what sovereignty is.

(5) Original exemplar or common core

Gallie's sixth criterion entails that the concept should be derivable from an *original exemplar* whose authority is acknowledged by all the contestant users of the concept. It is occasionally alluded to as self-defeating, since it is in the very nature of essentially contested concepts to be contestable at their core and, therefore, a common core in the form of an original exemplar seems contradictory to require.³⁴ However, it is an important criterion for distinguishing essentially contested concepts from radically confused concepts where the contestation originates in different aims. If not in the form of an original exemplar, there has to be some common core that ties the divergent conceptions of an essentially contested concept together and indicates that the contestants are within the same subject-matter.³⁵

Instead of taking the form of an original exemplar, the common core of an essentially contested concept can also be found in a central problem. In this line of reasoning, proposed by Waldron, "rival conceptions are rival proposals for solving it or rival proposals for doing the best we can in this regard given that the problem is insoluble."³⁶

The central problems of sovereignty relate to the various descriptions of the concept: sovereignty as a result-oriented, problem-oriented and normative concept. As a result-oriented concept, sovereignty questions the conditions for the existence of sovereignty. As a problem-oriented concept, it asks who should exercise sovereignty and what form these entities should take. And as a

³² Gallie, *supra* n.13, p. 172.

³³ Okoye, *supra* n.1919, p. 618.

³⁴ *Ibid.*, p. 618.

³⁵ *Ibid.*, p. 619.

³⁶ J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', 21 *Law and Philosophy* (2002) p.137 at p. 157-158.

normative concept, it probes the justification for the exercise of sovereignty through sovereign values.³⁷

Thus, the different conceptualisations of sovereignty are tied together as they all answer one or more of the questions that relate to a certain power or authority: what does this power or authority entail, who exercises and who should exercise this power or authority and what legitimizes this power or authority?

(6) Optimum development

According to Gallie's seventh and last criterion, it should be probable that the continuous debate contributes to finding a solution to sovereignty's central problems, or in Gallie's words, enables the original exemplar's achievement to be sustained and/or developed in *optimum fashion*.³⁸ This criterion is a positive side-note rather than a strict criterion, for Gallie thinks that the acceptance of the essentially contested nature of a concept can reduce the potential for extreme conflicts and could therefore allow for an optimum development of the concept.³⁹

To conclude, the concept of sovereignty satisfies Gallie's seven criteria and can, hence, be called an essentially contested concept. This insight might mitigate serious conflict when each group claims that the function sovereignty "fulfils on *its* behalf or on *its* interpretation, is the correct or proper or primary, or the only important, function which the term in question can plainly be said to fulfil,"⁴⁰ and that their conception of sovereignty best fits within the theoretical understanding of the world-order and enhances the explanatory and/or normative value of that understanding.⁴¹

More in general, acknowledgement of the essentially contested nature of sovereignty is essential to the public debate about an impact on sovereignty, for the dispute about the impact of European institutions and legislation might be a direct consequence of the different conceptualisations of sovereignty that the contestants hold. In the current public debate, contestants do not seem to be aware that they possibly lack a common understanding of the concept of sovereignty.

A follow-up question is: besides neutralizing conflict, can acknowledgement of sovereignty's essentially contested nature help to find a feasible way of conceptualising the concept? In other words, what are the implications of accepting the concept's essentially contested nature for this paper's investigation into a conceptualisation of sovereignty for impact assessments?

2.2. A Fruitful Approach

By classifying certain concepts as essentially contested, Gallie has created awareness among contestants that a general principle may be unobtainable for deciding which of the contestant uses is the 'best' use of the concept. This does not only help to mitigate serious conflicts, it also implies that an ontological investigation into what sovereignty *is* might not be very fruitful. Instead of defining what sovereignty is, contestants should focus on explaining or showing the rationality of a particular use of the concept by a given group of contestants.⁴² That is, the essentially contested nature of sovereignty elucidates that the best approach towards understanding which issues are at play when

³⁷ Compare Sarooshi, *supra* n.2121, p. 1109.

³⁸ Gallie, *supra* n.13, p. 180.

³⁹ Okoye, *supra* n.19, p. 619.

⁴⁰ Gallie, *supra* n.13, p. 168.

⁴¹ Walker 2006, *supra* n.3, p.4.

⁴² Gallie, *supra* n.13, p. 189.

the concept is used, is investigating what the concept *does* in a particular use by a particular group of users. The question of the function of a concept in a particular use by a particular group of users can be answered with a 'helicopter view' on the debate without having to choose sides.

Koenis, a Dutch philosopher, proposes something similar for the essentially contested concept 'culture'. He considers the concept of culture to be a connecting element between diverse societal debates. Since it is not clear whether 'culture' has the same meaning in these debates, he proposes to investigate what the concept *does*. With this question he has the following subquestions in mind: (1) In which context is the concept used? (2) What effects should the concept produce? (3) What objective do the users have when they use the concept?⁴³ In other words, Koenis investigates what the function of the concept 'culture' is in its particular use by a particular group of users.

Thus, the essentially contested nature of sovereignty clarifies why one will be grasping at straws when trying to find a definition of what sovereignty *is*. Instead, Koenis' questions could be used to conceptualise sovereignty on the basis of its function in a particular use by a particular group of users. In the next part of this article, this will be applied to the use of sovereignty in claims about an impact on national sovereignty of European institutions and legislation, and in particular of mutual recognition in the AFSJ. These were the claims that motivated this research.

3. The function of Sovereignty

3.1. Political and Legal Conceptions of Sovereignty

In order to examine the use of sovereignty in claims about an impact of European institutions and legislation on national sovereignty, a delineation should be given of which particular use by which particular group of users is analysed.

Mostly, a distinction is made between the use of the concept in political and legal debates. The political conception of sovereignty refers to the question of the concentration and division of decision-making power in the EU and the claim to sovereignty is mainly a claim to ultimate political power, namely the decision-making power of the nation-state is asserted. This political conception of sovereignty can be distinguished from a legal conception in which the claim to sovereignty does not concern ultimate political power but ultimate legal authority.

The legal conception of sovereignty is historically closely linked to the political conception. For example, Austin focusses on political sovereignty in his command theory of law, thereby combining political and legal elements in a single concept of law.⁴⁴ The conceptions are also inseparable in practice, as legal sovereignty requires political sovereignty and *vice versa*. Since law is a political instrument and creation, it is difficult to conceive of legal sovereignty without political sovereignty. Similarly, it is difficult to understand how political sovereignty can be exercised without legal sovereignty.⁴⁵ For example, the claim to ultimate political power in relation to European institutions and legislation concerns the power to make legal rules and, hence, rests on the idea of ultimate legal authority.

⁴³ Koenis (2008), *supra* n.18, p. 161.

⁴⁴ N. Walker, 'Sovereignty and Differentiated Integration in the European Union', 4(4) *European Law Journal* (1998) p. 355 at p. 357.

⁴⁵ Besson, *supra* n.10, p. 9.

Although historically and practically intertwined, a conceptual distinction between legal and political sovereignty is useful, because the two conceptions correspond to different dimensions of sovereignty.⁴⁶ The political conception of sovereignty corresponds to the empirical dimension. It describes the power relations among authorities and is a measure of their capacity to command. Since it concerns the currently observable division of power, it has a certain transience. The political conception inherits the continuing conflict existing in politics. By contrast, the legal conception corresponds to the normative dimension of sovereignty. It attempts to explain and justify power relations. As a claim to legal authority, a claim to legal sovereignty is a claim to a particular legal status.⁴⁷ This carries “a type of normative power which purports to be able to settle for practical purposes matters within the polity which are controversial and disputed.”⁴⁸ The explanatory and justificatory function of legal sovereignty makes it less vulnerable to the immediate changes of political reality than a political conception of sovereignty. Moreover, it can provide more content for investigating changes in the configuration of power or legal authority than the political conception, as it provides an *ex ante* explanatory and justificatory framework for the configuration of power or authority instead of an *ex post* description of this configuration.

Therefore, the use of sovereignty will be analysed from a legal perspective in this article. The legal conception of sovereignty in claims about the impact of European institutions and legislation concerns the question whether changes in legal authority caused by European institutions and legislation can be justified and can fit within the current explanatory framework for sovereign authority.

The legal conception of sovereignty can be further subdivided into an internal and an external perspective. The internal dimension of legal sovereignty relates to the internal affairs of a polity. It refers to the ultimate source of authority *within* a territory. This can be either a particular institution (the King or Parliament) or a collectivity (the people) within the State. The external dimension of sovereignty contains a claim to legal authority in relation to other polities. Through the legal fiction of international law, external sovereignty is usually attributed to the State as whole. This is a legal abstraction, for ultimately the bearer of sovereignty is an institution or collectivity within the State, since those entities that can plausibly make sovereignty claims in the external dimension are precisely those that claim internal ultimate decision-making authority.⁴⁹

Concretising the bearer of sovereignty in the internal dimension, gives claims about the impact on national sovereignty more substance. Indeed, European institutions and legislation might not only affect the configuration of power or legal authority between states and the EU but also the configuration of authority within a State.

The analysis of the function of sovereignty in this article will focus on the legal internal conception of sovereignty used by national constitutional courts. National constitutional courts base their explanation and justification of sovereignty claims in relation to other polities on the national constitution and use an internal legal conception of sovereignty. It is explicitly chosen to examine a national interpretation of sovereignty and not a conceptualisation of sovereignty as laid down by the

⁴⁶ Ibid., p. 3.

⁴⁷ Walker (2006), *supra* n.313, p. 345.

⁴⁸ Walker (1998), *supra* n.44, p. 357.

⁴⁹ C. Mac Amhlaigh and A. Glencross, ‘Sovereignty in the EU Constitutional Order: Integrating Law and Political Science’, Edinburgh School of Law Working Paper Series (2009-2010), p. 3; De Witte, *supra* n.10, p. 147.

European Court of Justice derived from, inter alia, the foundational judgements of *Van Gend&Loos*⁵⁰ and *Costa/ENEL*⁵¹. This choice is justified by the fact that claims about an impact of European institutions and legislation on sovereignty concern the impact on *national* sovereignty and mostly arise from national concerns.

Hence, the conceptualisation of sovereignty is narrowed down to its legal internal use by national constitutional courts in the EU. The framework that this conceptualisation provides for assessing the impact of European institutions and legislation on national sovereignty will be a legal internal framework derived from judgements of national constitutional courts in the EU.

3.2. Sovereignty according to National Constitutional Courts

3.2.2. The Context and Objective of the use

Sovereignty is used by national constitutional courts to resolve cases involving a conflict between EU and national law; it is used to set limits to the European integration process.⁵² In general, the courts accept the supremacy of EU law. As the German Constitutional Court reasons in its *Honeywell* ruling⁵³, EU law has primacy because “the Union could not exist as a legal community if the uniform effectiveness of Union law were not safeguarded in the Member States.”⁵⁴ However, this primacy is not unlimited. In the same judgement, the German Constitutional Court states, “unlike the primacy of application of federal law, as provided for by Article 31 of the Basic Law for the German legal system, the primacy of application of Union law cannot be comprehensive.”⁵⁵ By the use of national sovereignty, limits to the primacy of EU law are defined and justified.

The context in which the term is used, is related to the objective of its use: by reference to national sovereignty, national constitutional courts try to shape the *vertical* relation between the national and the European legal order. Thereby, the use of the term shapes the process of European integration. Specifically, national sovereignty is used to demarcate the conferral of powers to the European Union and to emphasize that legal authority ultimately lies with the national constitutional courts and, hence, resides within the State.

3.2.3. The effects of the use

As national sovereignty is used to set limits to the European integration process, these limits might point at the effects that the use of the term should produce. Which issues are at stake according to those who see a threat in the loss of national sovereign authority? In other words, what does the (continued) existence of national sovereignty in legal discourses justify?

In comparison to the judgements of northern, southern, eastern and western constitutional courts in the EU⁵⁶, the limits laid down by the Spanish Constitutional Court most clearly points at the effects that the use of national sovereignty should produce. The clarity of the Spanish account can be explained by the fact that the Spanish Constitutional Court has extracted the main issues from the

⁵⁰ HvJ EG 5 February 1963, ECLI:EU:C:1963:1, *Van Gend&Loos*.

⁵¹ HvJ EG 15 July 1964, ECLI:EU:C:1964:66, *Costa/ENEL*.

⁵² Craig and De Búrca, *supra* n.2, p. 278.

⁵³ BVerfG 6 July 2010, 2 BvR 2661/06, *Honeywell*.

⁵⁴ *Ibid.*, para 53.

⁵⁵ *Ibid.*, para 54.

⁵⁶ In particular, the Czech, French, German, Hungarian, Italian, Polish and Spanish Constitutional Courts.

judgements of other constitutional courts. The court is known for drawing its judgements on the judgements of other constitutional courts; it “has basically followed the lead of comparative law sources, especially the case law of the Italian Constitutional Court and the traditional case-law of the German Constitutional Court, i.e., its case-law prior to the broad developments commencing with its ruling on the Lisbon Treaty.”⁵⁷ Therefore, it is likely that the effects extracted from the Spanish case law are representative for the effects that other constitutional courts by the use of national sovereignty intend to produce.

In its review on the constitutionality of the Treaty establishing a Constitution of Europe (Declaration 1/2004), the Spanish Constitutional Court speaks of “the guarantee of the *existence of the states and their basic structures, as well as their values, principles and fundamental rights*, which under no circumstances may become unrecognizable after the phenomenon of the transfer of the exercise of competences to the supra-state organization, a guarantee whose absence or lack of explicit proclamation previously explained the reservations against the primacy of Community legislation with regard to the different constitutions by known decisions of the constitutional jurisdictions of certain states, in what has become known in the doctrine as the dialogue between the constitutional courts and the ECJ.”⁵⁸ These limits point at two effects that the use of sovereignty should produce: (1) protecting the existence of the State and its basic structures, (2) protecting the State’s values, principles and fundamental rights.

In the following, the two criteria are further examined in the judgements of the German and the Czech Constitutional Court.⁵⁹ The judgements of the German Constitutional Court are chosen, because the German Court is the most active court in the legal debate about the relationship between EU law and national law, and other constitutional courts have followed its standpoints in their rulings.⁶⁰

In order to put the rich jurisprudence of the German Constitutional Court in perspective, the Czech Constitutional Court’s judgements are the most interesting to analyse as this court has explicitly distanced itself from certain arguments made by the German Constitutional Court. Also, the Czech Constitutional Court has recently taken a leading role in the conflict between EU and national law, as it was the first court to declare that the EU transgressed its competences.⁶¹

(1) The existence of the State and its Basic Structures

As to the first effect, the German Constitutional Court has laid down two limits that show its interest in protecting the existence of the German State and its basic structures: the *ultra vires* lock and the identity lock.

The *ultra vires* lock concerns the competence to decide on the division of competences between EU law and national law. More specifically, it concerns the competence to decide whether the EU is transgressing its competences, i.e. is acting *ultra vires*. The German Constitutional Court attributes

⁵⁷ P.P. Tremps, ‘National Identity in Spanish Constitutional Court Case-law’, in A. S. Arnaiz and C. A. Llivina (eds.), *National Constitutional Identity and European Integration* (Cambridge, Antwerp and Portland: Intersentia, 2013) p. 263 at p. 270.

⁵⁸ Tribunal Constitucional de España 13 December 2004, Declaration 1/2004, *DTC 1/2004*, at §3.

⁵⁹ Due to limits to the length of this article, the examination is restricted to two national constitutional courts.

⁶⁰ It is known that the Czech, Hungarian, Italian, Polish and Spanish Constitutional Courts have partly or fully based their judgements on the judgements of the German Constitutional Court.

⁶¹ See the *Slovakian pension-case*, which is also mentioned below, *infra* n.8888.

itself the legal authority to decide on this. It states in its *Brunner Urteil*⁶², “if European institutions or agencies were to treat (*handhaben*) or develop (*fortbilden*) the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession (*Zustimmungsgesetz*), the resultant legislative instruments would not be legally binding within the sphere of German sovereignty (*Hoheitsbereich*). The German state organs would be prevented for constitutional reasons from applying them in Germany. Accordingly, the Federal Constitutional Court will review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred to them or transgress them.”⁶³ This is restated in the *Honeywell* judgement, where the court regards itself “empowered and obliged to review acts on the part of European bodies and institutions with regard to whether they take place on the basis of a manifest transgression of competence or on the basis of the exercise of competence in the area of constitutional identity which is not assignable (Article 79.3 in conjunction with Article 1 and Article 20 of the Basic Law) ... and where appropriate to declare that inapplicability of acts for the German legal system which exceed competences.”⁶⁴

It should be noted that it is fairly vague when *ultra vires* objections are accepted and could be raised and pursued, even though the court uses clear language about its competence to review *ultra vires* acts.⁶⁵ In the *Honeywell* ruling, the court suggests that it would not lightly conclude that the EU had acted *ultra vires*. In terms of procedure, the court only admits a challenge to the supremacy of EU law when the European Court of Justice (ECJ) has been given the opportunity to rule on the issue. In terms of substance, the court elucidates that an excess of power by the EU may only be concluded when the claimant has shown that the EU “was ‘manifestly’ in violation of its competence and that the impugned act was ‘highly significant’ in the structure of competence between the Member States and the EU.”⁶⁶ However, in the *OMT* case,⁶⁷ concerning the Outright Monetary Transactions programme of the European Central Bank during the Euro-crisis, this softened approach to *ultra vires* review seemed to have disappeared. The court has set out six prerequisites, defined by the ECJ, that had to be fulfilled in order for the Bundesbank to be legally allowed to participate in the implementation of the OMT programme. If these conditions were not met, “it would constitute a sufficiently qualified exceeding of competences within the meaning of *ultra vires* review.”⁶⁸

Whether the *ultra vires* lock is an effective and strict limit to the primacy of EU law or not, the lock shows the German Constitutional Court’s concern for retaining ultimate legal authority. With the lock, a minimum of legal authority is retained within the German legal order, which is a way of protecting the continued existence of the German State and its basic structures in the process of European integration. As the German Constitutional Court states in its much discussed and analysed *Lisbon* ruling on the constitutionality of the Treaty of Lisbon, the EU is “an association of sovereign

⁶² BVerfG 12 October 1993, 2 BvR 2134/92 & 2159/92, *Maastricht/ Brunner Urteil*.

⁶³ *Ibid.*, para 89; M. H. Wiegandt, ‘Germany’s International Integration: the Rulings of the German Federal Constitutional Court on the Maastricht treaty and the Out-of-Area Deployment of German Troops’, 10(2) *American University International Law Review* (1995) p. 889 at p. 899, footnote 43.

⁶⁴ BVerfG 6 July 2010, 2 BvR 2661/06, *Honeywell*, at para 55.

⁶⁵ C. Tomuschat, ‘The Defence of National Identity by the German Constitutional Court’, in A. S. Arnaiz and C. A. Llivina (eds.), *National Constitutional Identity and European Integration* (Cambridge, Antwerp and Portland: Intersentia, 2013) p. 205 at p. 210.

⁶⁶ Craig and De Búrca, *supra* n.2, p. 285; BVerfG 6 July 2010, 2 BvR 2661/06, *Honeywell*, para 60, 61.

⁶⁷ BVerfG 14 January 2014, 2 BvR 2728/13, *OMT*.

⁶⁸ *Ibid.*, para 207.

states (*Staatenverbund*) to which sovereign powers are transferred”⁶⁹ and as the transfer of sovereign powers comes from the Member States, they permanently remain “the Masters of the Treaties”.⁷⁰

The second limit that shows the German Court’s interest in protecting the existence of the State and its basic structures – the identity lock – also concerns the German Constitutional Court’s competence to review, but instead of reviewing a possible excess of competences by the EU, it is a review of whether Germany’s constitutional identity is respected. The court sees this review power as the only way to safeguard the fundamental political and constitutional structures of sovereign Member States in a progressing process of European integration.⁷¹

The German Constitutional Court conceptualises the German constitutional identity as the identity of the Basic Law. Thereby, it reduces the identity lock to a review of the “inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected (see BVerfGE 113, 273 <296>).”⁷² Article 23.1 of the Basic Law concerns the possibility of transferring sovereign powers to the EU. This transfer, however, cannot confine the unamendable content of the Basic Law, as described in Article 79.3 of the Basic Law. Article 79.3 of the Basic Law is the so-called ‘eternity guarantee’, which provides that the principles laid down in Articles 1 and 20 of the Basic Law cannot be amended.⁷³ These principles include “democracy, the rule of law, the principle of the social state, the republic, the federal state, as well as the substance of elementary fundamental rights indispensable for the respect of human dignity”⁷⁴.

The value attached to the principles by the German Constitutional Court is reflected in the court’s perspective on the importance of protecting the existence of the State and its basic structures. The German Constitutional Court does not consider the protection of the existence of the State as an end in itself but a means to an end, namely a means to protecting its principles. As the court states, “sovereign statehood stands for a pacified area and the order guaranteed therein on the basis of individual freedom and collective self-determination. The state is neither a myth nor an end in itself but the historically grown and globally recognised form of organisation of a viable political community.”⁷⁵

However, this does not make the effect of protecting the German state and its basic structures less essential for the German Constitutional Court, because the court does not see the State as “a form (among others) but *the* (ultimate) form of a political community”⁷⁶ in which the German values, principles and fundamental rights can flourish. This is mainly based on the court’s idea of democracy. The principle of democracy is considered to be at the heart of Germany’s constitutional identity.⁷⁷ It

⁶⁹ BVerfG 30 June 2009, 2 BvE 2/08, *Lisbon*, para 229.

⁷⁰ *Ibid.*, para 231.

⁷¹ *Ibid.*, para 240.

⁷² *Ibid.*, para 240.

⁷³ Tomuschat, *supra* n.6565, p. 212.

⁷⁴ BVerfG 30 June 2009, 2 BvE 2/08, *Lisbon*, para 217.

⁷⁵ *Ibid.*, para 224.

⁷⁶ R. Bieber, ‘Comments on the German Constitutional Court’s Decision on the Lisbon Treaty: “An Association of Sovereign States”’, 5(3) *European Constitutional Law Review* (2009) p. 391 at p. 392.

⁷⁷ BVerfG 30 June 2009, 2 BvE 2/08, *Lisbon*, para 216.

is established in the right to vote, which the court regards as a right equal to a fundamental right⁷⁸ and “the citizen’s most important individual right to democratic participation guaranteed by the Basic Law.”⁷⁹ The court thinks that democracy is only able to flourish within the ‘primary political area’⁸⁰ of the nation-state; democracy is existentially bound to the (pre-)existence of the German state.⁸¹ Although the democracy of the EU is approximated to federal state concepts, which is different from a national democratic concept,⁸² the German Court considers the EU incapable of becoming fully democratic, because the EU is a secondary legal order, derived from that of the Member States, and there is no ‘European people’ that can be democratically represented in the European Parliament.⁸³

Hence, in the eyes of the German Constitutional Court, the existence of the State and its basic structures is a prerequisite for the protection of the State’s values, principles and fundamental rights. Specifically, the existence of the State and its basic structures is considered essential for protecting the inviolable core of the German constitutional identity: the principle of democracy.

The Czech Constitutional Court has copied the German *ultra vires* lock in its Lisbon decisions,⁸⁴ just like the Danish Highest Court in its *Maastricht* decision⁸⁵ and the Polish Constitutional Tribunal in its decision on the Accession Treaty.⁸⁶ The Czech and the Polish Constitutional Court ‘drew explicitly on the German *Maastricht* decision for inspiration.’⁸⁷ The Czech Constitutional Court was even the first national court to declare a European act *ultra vires*. In the so-called *Slovakian pension-case*,⁸⁸ the Czech Court ruled that the ECJ had in its *Landtová* ruling⁸⁹ “wrongfully applied an EU regulation on the coordination of social security schemes (Coordination Regulation)⁹⁰ to facts devoid of any cross-border dimension.”⁹¹

⁷⁸ Ibid., para 208.

⁷⁹ Ibid., para 210.

⁸⁰ T. van den Brink and J.W. van Rossem, ‘Sovereignty, Stability and Solidarity: Conflicting and Converging Principles and the Shaping of Economic Governance in the European Union’, UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 04061213 (December 6, 2013) at p. 6.

⁸¹ M. Wendel, ‘Lisbon before the Courts: Comparative Perspectives’, 7(1) *European Constitutional Law Review* (2011) p. 96 at p. 119.

⁸² BVerfG 30 June 2009, 2 BvE 2/08, *Lisbon*, para 288.

⁸³ D. Halberstam and C. Möllers, ‘The German Constitutional Court says “Jaz u Deutschland!”’, 10(8) *German LJ* (2009) p. 1241 at p. 1241, 1247.

⁸⁴ Czech CC 26 November 2008, Pl ÚS 19/08, *Treaty of Lisbon I*.

⁸⁵ Danish HC 6 April 1998, I 361/1997, *Carlsen v. Rasmussen*.

⁸⁶ Polish CT 11 May 2015, K 18/04, *Accession Treaty*.

⁸⁷ Wendel, *supra* n.81, p. 130.

⁸⁸ Czech CC 31 January 2013, Pl ÚS 5/12, *Slovak Pensions XVII*.

⁸⁹ ECJ 22 June 2011, C399/09, *Landtová*.

⁹⁰ Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, English special edition of the OJ: Series I, ch. 1971(II) at p. 416.

⁹¹ J. Komárek, ‘Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions XVII* (Case Note)’, 8 *European Constitutional Law Review* (2012) p. 323 at p.323.

The Czech Constitutional Court also makes use of an identity lock, but has firmly criticized the German Constitutional Court for its approach. Specifically, the Czech Court criticized the catalogue of essential State functions that the German Court has developed⁹² and the German Court's conceptualisation of the German Identity by formulating in advance, in an abstract context, the inviolable core content of its constitutional identity. Both critiques identify it as an act of judicial activism to determine substantive limits to the transfer of powers when decisions on the scope and content of these limits have not explicitly been made on the political level.⁹³

In general, the Czech Court's criticism on the German Constitutional Court's approach comes down to a rejection of the German Court's exclusive concept of the State as the ultimate form of political community. The Czech Court does not regard the State as the only political area in which state values, principles and fundamental rights can flourish. Instead of the EU being a secondary order, it sees democratic legitimation of EU authority as having a multi-levelled nature, which is not derived solely from national democratic legitimation.⁹⁴ It states that, "the democratic process on the Union and domestic level mutually supplement and are dependent on each other."⁹⁵

The critique makes clear that the Czech Constitutional Court is ambivalent about whether it values the existence of the State and its basic structures in itself or see it as a means to an end, namely a way of securing the second effect – protecting the State's values, principles and fundamental rights. Just like the German Constitutional Court, the Czech Constitutional Court states that the need to protect the existence of the State and its basic structures is derived from the need to protect the State's values, principles and fundamental rights. In its *Lisbon II* judgement, the Czech Court recalls "that (as it found in point 209 of the *Lisbon Treaty I* judgment) sovereignty of the state in a modern democratic state is not an aim in itself, thus in isolation, but it is a means to fulfil the foundational values upon which the construction of the democratic state based on the rule of law stands."⁹⁶

However, by rejecting that the existence of the State is a prerequisite for flourishing values, principles and fundamental rights, the protection of the State in relation to the transferral of powers to the EU is no longer justified. If the EU and the Czech Republic mutually supplement each other, there is no reason for limiting the transferral of power to the EU in order to protect the existence of the Czech Republic and its basic structures. The Czech Court does not clarify whether it would allow the State to become indispensable when the State's values principles and fundamental rights are able to flourish to the same standards within another political area than the nation-state, such as the EU. The Czech Court seems to be in two minds by arguing that the EU has reached a multi-levelled stage beyond a nation-centric sovereignty paradigm as well as firmly protecting the existence of the State with its *ultra vires* review.⁹⁷

⁹² In this list, the German Constitutional Court set out five key competences that are "particularly sensitive for the ability of a constitutional state to democratically shape itself." Thereby, it developed a *Staatsaufgabenlehre* – a theory of what necessary tasks the State must fulfil – and quite explicitly shows its intention to protect the existence of the German State. [BVerfG 30 June 2009, 2 BvE 2/08, *Lisbon*, para 252; Halberstam and Möllers, *supra* n.83, p. 1249.]

⁹³ Wendel, *supra* n.81, p. 127.

⁹⁴ Wendel, *supra* n.81, p. 117.

⁹⁵ Czech CC 30 November 2009, PI ÚS 29/09, *Treaty of Lisbon II*, para 139.

⁹⁶ Czech CC 30 November 2009, PI ÚS 29/09, *Treaty of Lisbon II*, para 147.

⁹⁷ Van Rossem, *supra* n.6, p. 263.

The above examination of the German and the Czech Constitutional Court's judgements makes clear that the protection of the State and its basic structures is an effect intended by the use of sovereignty, but this effect is only justified by the need for protecting the State's value, principles and fundamental rights. In the end, the sovereign values justify the existence of the State and, hence, the national claims to sovereignty. However, if an exclusive conception of the State is maintained, like the German Constitutional Court does, the protection of the existence of the State remains an essential effect. If a non-exclusive conception of the State is maintained, like the Czech Constitutional Court does, the necessity of protecting the existence of the State and its basic structures becomes ambivalent.

(2) The State's values, principles and fundamental rights

The second effect that the use of sovereignty intends to bring about is the protection of the State's values, principles and fundamental rights. The importance attached to this effect follows from the previous discussion, which made clear that protecting the existence of the State and its basic structures is a vehicle for protecting the State's values, principles and fundamental rights. These values and principles justify the existence of the State and national claims to sovereignty. This also came to light in the discussion on the essentially contested nature of sovereignty. Sovereignty expresses and incorporates certain sovereign values, such as democracy, the rule of law and human rights protection, which it seeks to implement in practice and according to which the sovereign powers are evaluated.

Moreover, it should be noted that there is a considerable overlap between the protection of the State's basic structures and its values and principles, since labelling State's structures as 'basic' might depend on an idea of which structures are essential for the protection of the State's values and principles.

4. Concluding Remarks

The concept of sovereignty is an essentially contested concept. The debate over sovereignty is inherent to the very nature of the concept, which makes it impossible to find a commonly agreed definition. Acknowledgement of the essentially contested nature of sovereignty in public debates could not only mitigate conflict, but also shows the demand for clarifying which interpretation of sovereignty is used when an impact is claimed.

In the current public debate, there is a lack of awareness about this essentially contested nature of sovereignty, while it causes broad misunderstanding when the concept is used. As long as there is no clarity about which conceptualisation of sovereignty is used, it is impossible to have a meaningful debate about the impact of European institutions and legislation on national sovereignty. Contestants might not be disagreeing about the effects of European institutions and legislation, but about the issues that they intend to protect by the use of the concept. This creates the impression that current claims about an impact of European institutions and legislation on national sovereignty are nothing more than myths and 'thought-destructive mantras', as claims about the impact on an undefined concept are empty statements.

Although the essentially contested nature of sovereignty explains why one might find oneself grasping at straws when trying to define sovereignty, this is not a reason to avoid or reject the use of the notion of sovereignty. Instead, awareness of the essentially contested nature can be used to distinguish fruitful from less fruitful approaches to conceptualising sovereignty. It illuminates that

defining what sovereignty *is*, leads us down a blind alley, while the function of sovereignty in a particular use by a particular group of users can be described. Hence, sovereignty cannot be conceptualised in a general public use, but the conceptualisation should be narrowed down to the use in a particular legal or political debate.

In this article, the functional approach has been applied by conceptualising the use of sovereignty by national constitutional courts. In particular, this conceptualisation can give claims about the impact of mutual recognition in the AFSJ more substance. It elucidates that national sovereignty is used in the context of a *vertical* relation between the EU and its member states. This might be important to note when the relative impact of mutual recognition and harmonisation on national sovereignty in the AFSJ is examined, since mutual recognition is mainly a horizontal regulatory measure while harmonisation is a vertical measure. Moreover, the description points to two important effects that are at stake when assertions about the impact on national sovereignty are made: the protection of (1) the existence of the State and its basic structures, and (2) the State's values, principles and fundamental rights. Hence, assertions about the impact on national sovereignty come down to assertions about the impact on the bearer of sovereignty and the impact on the sovereign values that justify the exercise of sovereignty.

These two effects in combination with the context and objective of the use of sovereignty by national constitutional courts could provide the main pillars or basis of a framework to assess the impact of European institutions and legislation on national sovereignty, whereby past and future impact claims can be underpinned. Such an assessment framework will always be accompanied by the side-note that it is based on just one of the many conceptualisations of sovereignty, which will definitely not be the right or best conceptualisation according to everyone.

Moreover, also within this conceptualisation by national constitutional courts, a choice has to be made between the conceptualisation of the German and the conceptualisation of the Czech Constitutional Court. The relative weight given to the two effects – the existence of the State and its basic structures, and the State's values, principles and fundamental rights – differs per court. While the German Constitutional Court uses an exclusive conception of the State, in which the State is considered the only political community where the state values, principles and fundamental rights can flourish, the Czech Constitutional Court uses a non-exclusive conception of the State, in which the EU and its member states are considered to be mutually supplementing each other. If an exclusive conception of the State is maintained, the protection of the existence of the State and its basic structures will be essential as a means to the end of protecting the State's values, principles and fundamental rights. But in a non-exclusive conception, it is unclear why the existence of the State and its basic structures should be protected against a transferral of power or authority to the EU.

Recognizing the essentially contested nature of sovereignty sheds light on the many conceptualisations of sovereignty that exist. It also has the normative consequence that none of the conceptualisations can objectively be regarded as better; neither the conceptualisation of the German nor the conceptualisation of the Czech Constitutional Court is better, they emphasize different aspects of the concept of sovereignty.

In the public debate, the constitutional core of sovereignty consisting of the sovereign values is not always recognized. The concept is also used to claim decision-making power over – what we might call – crooked cucumbers. This could be the use of a political conception of sovereignty, which lies far

apart from the legal internal conception of national constitutional courts in the EU. Without drawing the normative conclusion that either conceptualisation is better, contestants debating the impact of European institutions and legislation on national sovereignty should choose one of the two conceptualisations. For without agreement on the core concepts in a debate, the arguments are built on shifting sands.