SOVEREIGNTY AS ONE OF THE MAIN CRITERIA FOR THE CONSTITUTIONALITY OF EU LAW

I. Zabokrytskyy
Lviv Polytechnic National University, Ukraine
12, Stepana Bandery Str., Lviv 79000 Ukraine
ihorzab@gmail.com

Abstract. In this work sovereignty as one of the main criteria to the recognition of the basis of EU law as the supranational constitutional law is analyzed. Different approaches to the sovereignty concept are studied in the works of Ukrainian and foreign scientists in the sphere of constitutional, international and European Union law, as well as in the judgments of the European Court of Justice. The conclusion that EU and its legal system was created by the constitutive power of the EU peoples and that sovereignty realization on EU level is the criteria for constitutionality of EU law (as constitutional law traditionally deals with power and authority) is made.

Keywords: EU, sovereignty, constitutionality, constitutional law, international law, European Union law.

Introduction

The creation of new legal order in the European Union led to different scientific researches of its nature. One of actual questions is the constitutional nature of its legal system, and among different criteria for the recognition of the basis of EU law as constitutional sovereignty is one of the main, as it is closely related to the power and authority, which is the traditional subject of constitutional law. But as basically sovereignty is associated with the state, there is a need of a new view on the place of sovereignty, forms of its realization in the EU law. Concept of sovereignty was analyzed in the works of Ukrainian (V. Chushenko, I. Zayats, V.Kravchenko, V. Shapoval, A. Selivanov) and foreign lawyers (Klaus-Dieter Borchart, G. Musihin, Sherrill Brown Wells, Samuel F. Wells, A. Tokar, O. Mereschyakova) as well as it was mentioned in several decisions of the European Court of Justice. Although different scientist see sovereignty concept in different ways, only few of them, such as A.Tokar, Sherrill Brown Wells, Samuel F. Wells deal with the new problems that arise with the sovereignty problems in EU. But all of this works mainly deal with this problem from international perspective. The problem of sovereignty is the traditional constitutional concept, so we believe that these problems should be analyzed first of all from the bearers of the sovereignty points of view – nations and the peoples of the EU Member States. Thus, in this word different approaches to sovereignty are analyzed to prove the constitutional nature of the EU law, as the first in the history of humanity supranational constitutional law.

Method

In this work were used several methods: legal-comparative, historical, method of system analysis, formal-logical. Legal-comparative method was used for the research of different views on sovereignty concept. Historical method was used for the research of founding treaties and ECJ judgments impact on the formation of EU supranational law. Method of system analysis was used for the identification of the sovereignty place in the system of constitutional law and its relationship with the new legal order of the European Union. Formal-logical method was used for the determination of different concepts, such as “sovereignty”, “supranationality”.

Results

The realization of sovereignty under the EU law is one of the main criteria for the recognition of its constitutionality. Member States, combining their sovereignty in order to achieve its objectives set up at EU level authority, and create a system of legal rules to implement this authority. EU institutions create, execute and ensure compliance with these rules, these rules shall be binding in resolving certain social relations, and the source of these rules and their general validity is nothing, but sovereignty. And the sources of sovereignty
are the people of those states which are members of the EU, so we can confirm the opinion that the EU and its legal system were created by the constitutive power of the EU peoples. So, the basis of EU law has constitutional nature and can be described as the new supranational constitutional law.

Discussion

First of all, the decision of the European Court of Justice in which he acknowledged the principle of direct effect of EU law in the case of Van Gend en Loos v Nederlandse Administratie der Belastingen is very important. In this judgment the Court noted, that “the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community”. Thus, in this case the ECJ not only recognized the direct effect of EU law, but also interpreted the EU legal framework as a “new legal order” and said about the “limitation of sovereignty” of states. As ECJ according to the part 3 of Article 19 of the Treaty on European Union “The Court of Justice of the European Union shall, in accordance with the treaties give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions” the role of its decisions is extremely high. Also very important is the judgment in the case Flaminio Costa v ENEL. In this decision the ECJ recognized the Supremacy of EU law principle, noting that “by contrast with ordinary international treaties, the eec treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply. By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves”. Thus, according to professor Klaus-Dieter Borchardt “the only feature that the EU has in common with the traditional international organizations is that it too came into being as a result of an international treaty” (Borchardt, 2010, p.32). Also very important is the decision Parti écologiste "Les Verts" v European Parliament. In this judgment the ECJ stated, that “It must first be emphasized in this regard that the european economic community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty”. Thus, in this decision the Treaties on the European Union were described as constitutional charter. This decision of 1986 indicates that in that time the legal nature of the Treaties was constitutional, also the history has shown that trying to adopt in the XXI century a Constitution for Europe turned out to be precocious in terms of form (as almost all of its provisions have been adopted in the form of the Lisbon Treaty).

Thus, many questions related to existence of European Union’ legal system derive from the question of the sovereignty of states. In this connection it is necessary to find out what is meant by sovereignty. In general, under sovereignty (from Fr. Souveraineté - supreme power ) is understood supremacy and independence of government, its discretion to resolve its internal and external affairs, without interfering with them by any other authority (Kravchenko, 2007, p.584). Also V. Kravchenko says, that “in the science of constitutional law there are several types of sovereignty: state, national and popular… popular sovereignty means the sovereignty of people, that the possession of the people, which is the only source of power, of political and socio-economic instruments for meaningful participation in the exercise of public, political government (state and local governments), in the management of state and social affairs… in the correlation of “sovereignty of the people” and “state sovereignty” priority belongs to the sovereignty of people, who exercise constituent power and determine the constitutional order of the state and form of government… popular sovereignty should be seen as a natural right of the people to manage their own destiny, to create a social and constitutional order, which corresponds to its will” (Kravchenko,2007, p.78-81).

Thus, the sovereignty of the people is primary and has a priority in relation to the state, since the people determine how to exercise power. Similar ideas we can see in the works of V. Chushenko and I. Zayats – “in truly democratic society the primary and sole sovereignty is the sovereignty of the people… the state as the
main form of the people’s organization shall be the institution that was created to implement democracy (popular sovereignty)... therefore, primarily the basis of state sovereignty is the sovereignty of the people. Hence, we believe that state sovereignty is a supreme power that comes from the people and is the self-realization of government tasks and functions within the national and international law” (Chushenko and Zajac, 2007, p.263-264). Thus, at this stage of human development the state sovereignty serves as the most appropriate form of popular sovereignty exercise. Encyclopedia Britannica defines sovereignty as the ability to exercise independent authority over a geographic area, as territory. Thus, the main category of constitutional law in modern terms is the sovereignty of the state, and it acts as the foundation to the ability of participation in international relations. That’s why one of the principles established by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States is the principle of sovereign equality of the states. V. Shapoval defines state sovereignty as a crucial and integral quality of power that proves the supremacy of state within its territory and independence in their relations with other states (Shapoval, 2008, p.81). Therefore, the concept of state sovereignty is based on the recognition of inadmissibility of state power’s limitation against the will of its bearer. It is interesting that author believes that “national sovereignty is non-absolute, which was manifested during the development of international law, as peremptory norms (Jus Cogens) were defined by the practice of international community, and often outside the specific state will (outside international-treaty practice). Moreover, sometimes the concept of state sovereignty is seen as functional, and therefore some issues of internal state’s being (human rights, environment protection and others) do not belong exclusively to their jurisdiction and are considered as the object of interest of international community”. Thus, it reaffirms the conclusion that we made about a specific output of constitutional law concepts to the international level.

In general, the issue of sovereignty is rather complicated. H. Musihin believes that “the concept of sovereignty is one of the most used both in the field of law and political science as well as rhetorical disputes” and that “lawyers, political philosophers, constitutional theorists, political scientists deliberately multiply the content of sovereignty, giving it new and new epithets: internal and external, de jure and de facto, positive and negative, national, state, popular, legal, territorial, technological, cultural, economic, institutional and even racial” (Musihin, 2010, p. 64-65). This successful example shows that legal theory is still far from the full understanding of many phenomena and sovereignty is one of them. We believe that sovereignty shall be connected with the full ability to exercise power and as to the constitutional law state sovereignty remain major, although it is clear that it is only a form of popular sovereignty expression. A. Selivanov said that in accordance with the Treaty Establishing the European Community, the Treaty on European Union (consolidate version as of 2005) the member-states goal of sustainable improvement of working conditions is associated with a voluntary transfer of real amount of state sovereignty directly to the level of supranational structures. It is realized in the idea of united nations and “pooling sovereignties” (A. Selivanov, 2009, p.68). Thus, in this work of a well-known Ukrainian constitutionalist the problem of sovereignty transfer to the bodies of the European Union is mentioned. In our opinion, the question of sovereignty is one of the main key features that allows as to recognize the formation of a new, previously unknown, supranational constitutional law within the EU. Until recently, issues of power exercise (mainly those issues basically belong to the constitutional law) were associated basically with the concept of sovereignty characterized exclusively as possible at the state level, and the question of “state sovereignty – popular sovereignty” were considered sufficiently interconnected, but in the EU there is a real operating system of governance based on the provisions of the Treaties providing for the creation of an institutional mechanism that has the authority to exercise the power on a particular category of questions that are within the competence of the Union.

Sherrill Brown Wells and Samuel F. Wells noted, that Schuman Plan was the first step towards realization of the idea of “joint sovereignties” and the economic factor was decisive in vesting jurisdiction of a certain part on the newly established European Coal and Steel Community (Wells and Wells Jr., 2008, p.31). In fact, it is economic integration, awareness of its efficiency and the pursuit to its deepening led to the creation of EU and spreading of integration to other areas, the transformation of the economic union into a political union. In this connection the thought of A. Tokar, who said that “something happened to the notion of sovereignty in Europe after the creation and development of what is now called European Community and European Union. There is some important development under way that does not allow us to look at sovereignty of EU member states the same way we would do if there were no integration. This includes mainly the abortion of internal frontiers, the creation of a supranational legal system and the introduction of
the concept of a European citizenship. These are facts; even those who believe that integration has no effect on sovereignty do not deny them” (Tokar and Adrian, 2001, p.1).

A comprehensive study of the problems of supranationality and sovereignty in EU law was done by O. Meshherjakova (2010). The author notes a number of important provisions, including the following: “supranationality should be seen as the way of international cooperation of sovereign states, which limit their sovereignty and give supranational powers to international organization in order to perform some tasks”; “the EU has only those powers which It is given by the states and sovereign states’ competences transferred to the EU on the basis of EU Treaties are its supranational powers”. On the basis of this statements there is made a conclusion, that “that term “sovereign competences” for the Union can’t be applied, because the EU does not have sovereign jurisdiction, as it aims and objectives are determined by matching wills of the states”; “transfer of competence to the EU limits state power, and as public authorities can’t be considered in isolation from the state, we should talk about the limitation of the sovereignty and not only about the limitation of state power in certain areas or limits on government powers. Therefore supranationalism is always associated with voluntary limitation of national sovereignty” (Meshherjakova, 2010, p.8-13). Finally, the issue of sovereignty in the EU is not finalized – there is a talk about voluntary limitation as well as particular association (the so-called “pooling sovereignties”). The main factor is that still it all is voluntary – since the founding Treaties have been adopted by voluntary and provide for the right to secede from the Union. Therefore, it is not important exactly how sovereignty is manifested in EU law – by limiting, association, realization as the fact that it is in a particular way implemented within the framework of its legal system.

References
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