THE IDEA OF SOVEREIGNTY AND THE CONSTITUTIONAL NATURE OF THE EU — A BENTHAMIC PERSPECTIVE

Sten Verhoeven
Assistant Professor, Faculty of Law, University of Macau

Xiaobo Zhai,
Associate Professor, Faculty of Law, University of Macau

Abstract: This article aims to demonstrate how Bentham's theory of sovereignty can be used to improve our understanding of the constitutional nature of the EU. According to Bentham, sovereignty is constituted by people's general obedience. He distinguishes between operative sovereignty and constitutive sovereignty. Whereas the latter is the supreme power by the exercise of which operative sovereignty is created and conferred, operative sovereignty is the supreme power by the exercise of which business is done. Bentham's theory allows him to explain the sovereignty of irregular political entities, in his time, the Holy Roman Empire, the United Dutch Provinces, and the Helvetic Confederacy. Although these were constituted by sovereigns, they have their own operative sovereignty because they are habitually obeyed by the subjects. Applied to the EU, this entails that although the Member States have constituted the EU, the EU is more than the pooled sovereignty of the Member States and has its own operative sovereignty. Finally, the article demonstrates that although the EU is an operative sovereign in its own right, this does not entail that it is unlimited by law. The EU's competence is limited by the foundational treaties, but this does not affect its operational sovereignty. Bentham introduced the distinction between laws in populum, laws directed at the subjects, and laws in principem, laws addressing the powers and competence of the sovereign, which are ultimately enforced by the public opinion. Consequently, operative sovereignty may well be limited by laws in principem. The article concludes that in accordance with Bentham's theory of

sovereignty and his distinction between laws in populum and laws in principem, the EU is a legally limited operative sovereign.

Key Words: EU, Sovereignty, Political Society, Disposition to Obedience

This article aims to demonstrate how Bentham's theory of sovereignty can be used to improve our understanding of the constitutional nature of the EU, a new and autonomous legal order,[1] which has eluded classification. We will advance and demonstrate the thesis that according to Bentham's theory of sovereignty, the EU is an operative sovereign that is legally constituted and limited. Consequently, we will argue that the EU legal order should not be regarded as derived from the pooled sovereignty of the Member States, but possessing its own sovereignty in the areas of competence that have been conferred upon it.

Section one of the article will first introduce Bentham's distinction between the operative sovereign and the constitutive sovereign; Bentham's theory of operative sovereignty focuses upon the disposition or habit of the people's obedience to the supreme authority, which is not limited to the state as typically understood. This section will argue that the supreme law-maker in the EU is such an operative sovereign, and that the EU is a political society in Bentham's sense in which the subjects, including the Member States, are disposed to obey the authority possessed and exercised by the law -maker in the EU in its areas of competence.

The second section will look into the exact structure of operative sovereignty in the EU and inquire whether the roles of the Member States undermine the operative sovereignty in the EU by elaborating upon the internal dynamics of the EU's legal order. Although the Member States are sovereign states in themselves, they are not sovereigns in the EU. In this respect, the role of the Member States within the EU is a complex one. Member States are involved in the constitutional operation of the EU in three types of capacity. First, they are constitutive sovereigns by means of having collectively decided to create the EU. Second, as members of the Council of the EU, the Member States participate in the EU law-making process, but they do not possess the law-making power exclusively, but only conjunctively with the European Parliament and European Commission.[2] Furthermore, the Council of the EU, although comprised of the Member States, is legally a separate entity.[3] Third, Member States act as subordinate powerholders that implement EU law through their

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1 ECJ, *Costa v. E.N.E.L.*, Case 6/64, Judgment, 15 July 1964, [1964] ECR 585.

2 At least in the ordinary legislative procedure: Article 294 Treaty on the Functioning of the European Union.

3 It is one of the institutions of the EU: Article 13 (1) Treaty on European Union; Article 16 Treaty on European Union.

national legislature and executive, and apply EU law through their national courts, as required by the principle of sincere cooperation.[4] In addition, the European Court of Justice has the power to annul EU laws made by these EU institutions.[5] As a result, we will defend that the operative sovereignty within the EU resides conjunctively with the EU institutions and not the Member States, thereby reinforcing the conclusion of section one that the EU is an operative sovereign in its own right.

Finally, in the third section, we will argue that the EU, as an operative sovereign, is also a constitutional sovereign, that is a legally limited sovereign. We will start by examining the nature of the norms that have the EU as subject. These norms are distinguished into norms that constitute the EU and norms that limit the power of the EU. The former, the constitutive norms, create the EU as the result of the exercise of the constitutive sovereignty of the Member States, but in this creating process the Member States do not stand above or impose limits upon the operative sovereignty of the EU. The latter, the limitative norms, can be characterized as norms that limit the operative sovereignty of the EU. Although the EU is a sovereign which is subordinate to nobody, it is bound by these norms which are applied and enforced by the European Court of Justice. In this way, the European Court of Justice becomes the supreme arbiter of the EU, which raises the question how the European Court of Justice, as an institution of the EU, can be held accountable for its interpretation and application of primary and secondary EU law. Drawing on Bentham's theory of laws *in principem*, we will demonstrate that the binding force of limitative norms ultimately depends on the tribunal of public opinion.

1. Bentham's description of a sovereign and the sovereign in the EU

Bentham developed a sophisticated theory of sovereignty, one which can adequately explain the irregular structure of sovereignty in political entities, such as the Holy Roman Empire, the United Dutch Provinces, and the Helvetic Confederacy. Therefore, his theory of sovereignty is potentially useful for improving our understanding of the constitutional nature of the EU, whose exact classification has puzzled many.

1.1. Bentham's notion of an operative sovereign

For Bentham sovereignty is a notion which is intrinsically associated

4 Article 4 (3) Treaty on European Union; Article 291 (1) Treaty on the Functioning of the European Union; K. Lenaerts and P. Van Nuffel, *European Union Law*, London, Sweet & Maxwell, 2011, p. 688.

5 Article 263 Treaty on the Functioning of European Union.

with his idea of a state or political society. In his *Preparatory Principles*, a state is defined as 'a number of persons accustomed or agreed to act in all things as a certain person or persons shall command'.[6] In *Fragment on Government*, Bentham writes that a number of persons are in a political society when they 'are supposed to be in the habit of paying obedience to a person, or an assemblage of persons, of a known and certain description (whom we may call governor or governors)'.[7] Since the existence of a sovereign is the defining characteristic of a state or political society, Bentham also identifies what a sovereign is, that is 'a person, or an assemblage of persons' called 'governor or governors'. In *Limits*, Bentham writes, 'by a sovereign I mean any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience: and that in preference to the will of any other person'.[8] The sovereignty Bentham has in mind in these passages is that of operative sovereignty, which he distinguishes from constitutive sovereignty. Constitutive sovereignty is the supreme power by the exercise of which operative sovereignty is created and conferred. Operative sovereignty refers to the supreme power by the exercise of which obedience of individuals are called for and business is done. [9] In Bentham's view, the efficient cause of a sovereign's power is the 'supposed' disposition or habit of subjects to obey, whereas the efficient cause of the power of all subordinate power-holders is the command or permission of the sovereign himself.[10] A sovereign is therefore by definition effective. Constitutive power is different from operative power in that it does not give directions, nor does it reward or punish. Furthermore, operative sovereignty is the constantly exercised political and legal authority, whereas constitutive sovereignty is exercised at special moments.

Bentham's operative sovereign has two related meanings. The first refers to the entire state apparatus, that is 'the total assemblage of the persons by whom the several political operations ... come to be performed'.[11] This is the

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6 Bentham, *Preparatory Principles*, ed. Douglas G. Long and Philip Schofield (Oxford, 2016), 434. .

7 Bentham, *A Comment on the Commentaries and A Fragment on Government (Comment/Fragment hereafter),* ed. JH Burns and HLA Hart (London, 1977) 428.

8 Bentham, *Of the Limits of the Penal Branch of Jurisprudence (Limits hereafter)*, ed. Philip Schofield (Oxford, 2010), 42.

9 *The Works of Jeremy Bentham* (Bowring hereafter), published under the superintendence of his executor, John Bowring (Edinburgh, 1838-1843), vol. 9, 127; Bentham, *First Principles Preparatory to Constitutional Code*, ed. Philip Schofield, (Oxford, 1989), 6.

10 *Limits*, 42, 150n.

11 Bentham, *An Introduction to the Principles of Morals and Legislation* (*IPML* hereafter), ed. JH Burns and HLA Hart (London, 1970), 196.

meaning Bentham has in mind when he writes that a sovereign is a governor or an assemblage of governors,[12] or that sovereign power, when exercised by rule, is divided into the legislative and the executive branches,[13] or that several public trusts (including legislative, executive, and judicial) form subordinate branches of the sovereign power.[14] The second meaning is the supreme branch or department of the state apparatus, that is some one person, or body of persons, whose office it is to assign and distribute to the rest their several departments, to determine the conduct to be pursued by each in the performance of the particular set of operations that belongs to him, and even upon occasion to exercise his function in his stead.[15]

In this sense, Bentham says that, in England, the sovereignty resides in a body made of King, Lords, and Commons.[16] To use the word 'sovereign' to denote both the entire state apparatus and its supreme branch is potentially confusing, especially considering that it is an 'evident' truth for Bentham that 'to impede or misdirect the operations of the sovereign may be to impede or misdirect the operations of the several departments of government'.[17] In the end, for Bentham, all the powers of the various branches of the political state are derived from, or liable to be controlled by, the supreme branch. In what follows, a sovereign refers to the supreme branch of an operative sovereign, unless otherwise indicated.

1.2. The relative nature of an operative sovereign

A sovereign is constituted by the people's disposition to obedience. This thesis leads to a disconformity between Bentham's views and absolutist notions of sovereignty. According to Bentham, absolutist notions of sovereignty are too crude and simplistic to account for various real arrangements of sovereignty which are often highly sophisticated and refined. Bentham's theory concerns facts or possibilities, and it aims to make sense of, and to do justice to, the complex reality of sovereignty in history.[18] The people's disposition to obedience is by nature 'a

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12 *Comment/Fragment*, 428.

13 *IPML*, 263.

14 *IPML*, 264.

15 *IPML*, 200; also *Preparatory Principles*, 84: 'The supreme power in a state is that person, or those persons acting in a body, whose commands touching any matter all the rest of the persons in the state are in the habit of observing or enforcing, himself or themselves being commanded by none.' For a brief discussion, see Schofield, *Utility and Democracy*, 225.

16 Bentham, *Constitutional Code,* vol. 1, ed. F Rosen and JH Burns (Oxford, 1983), 104.

17 *IPML*, 196.

18 See also Schofield, *Utility and Democracy* (Oxford, 2006), 230; Fred Rosen, *Bentham and Representative Democracy* (Oxford, 1983), 44.

term of relation':[19] there is no explicit and determinate line between its presence and absence since it is relative to the fields of act, place, and time.[20] According to Bentham, if the time, the population, and the number of points of duty are given, a sovereign exists among the population when the number of acts of obedience is greater than that of acts of disobedience.[21] A sovereign, even if omnicompetent,[22] is by no means omnipotent and absolute.

Furthermore, sovereignty, in proportion to the scope and permanence of the disposition to obey or habit of obedience, may 'admitt of innumerable modifications' and be liable to 'much diversity and continual fluctuation'.[23] Being relative to place (the territoriality of the sovereign) and time is a plain feature of sovereignty.[24] However, and more importantly, Bentham advances that sovereignty is relative to the types of act regarding which subjects will obey the sovereign; with regard to different sorts of act, a man can be both superior and inferior, a sovereign and a subject, at the same time.[25] It follows from the idea of relative sovereignty that one person or set of persons may be sovereign in some cases, while another is as completely so in other cases.[26] Corresponding to the compartmentalized fields of human behavior, there may be more than one sovereign for the same people.

The truth of this unconventional view of Bentham's is made clear by real history. Bentham's abstract philosophy is highly sensitive to history and he especially emphasizes the value of concrete examples for building and understanding a theory: 'I rejoice always when I get hold of an example. By examples we are enabled to feel our way', when the abstract theory eludes our grasp.[27] The Holy Roman Empire, the United Dutch Provinces, and the Helvetic Republic are three examples that Bentham frequently and typically appeals to when developing his theory of sovereignty.[28] For the subjects in the different

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19 *Comment/Fragment*, 261, 432-3. Oren Ben-Dor's *Constitutional Limits and the Public Sphere: A Critical Study of Bentham's Constitutionalism* (Oxford, 2000) has a chapter 'The Relativity and Plurality of Sovereignty', but it his use of the idea of 'relative' is rather different from mine.

20 *Comment/Fragment*, 432-3.

21 *Comment/Fragment*, 429–30.

22 *Comment/Fragment*, 484.

23 *Limits*, 92, 44n.

24 *Limits*, 42; *Comment/Fragment*, 434, 484.

25 *Limits*, 91-2.

26 *Limits*, 42.

27 *Comment/Fragment*, 204.

28 *Limits*, 42, 53; *IPML*, 200; *Comment/Fragment*, 489. For the constitutional details of the Holy Roman Empire, see Peter Schröder, 'The Constitution of the Holy Roman Empire After 1648: Samuel Pufendorf's

member or local political units, there might be more than one sovereign, none of which is absolute or exclusive.[29] The subjects in each member unit live under the sovereign of that unit in some cases, but they meanwhile live under a common sovereign together with the subjects of other member units in other cases of common concern.[30] This situation is described by Bentham as 'sovereignties within sovereignties'.[31] We will designate the sovereign of the member unit 'member-sovereign'. A member-sovereign, in Bentham's eyes, is an '*imperium in imperio*'. Contrasted with 'the current notions' of sovereignty, an *imperium in imperio* is irregular, but Bentham sees nothing monstrous within it. The people's subjection to the member-sovereign and to the common sovereign, and the member-sovereigns' subjection to the common sovereign, are respectively confined to particular fields of acts. The member-sovereigns and the common sovereign are sovereign or supreme only with reference to some fields of acts. Another illustration of this theory is American federalism, in which, according to Bentham's description, a number of state-legislatures are 'as to this or that point, or any number of points, supreme: not subordinate with relation to the [central] Legislature'; or in which there are 'a number of Republics, each independent: in each of them the authority of the Legislature supreme, but agreeing to stand as to certain specified points, one or more, subordinate to a Central Legislature, the members of which shall be deputed from the several thus Confederated States'.[32] As a corollary of the plurality of sovereigns, there might be more than

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Assessment in his *Monzambano'*, *The Historical Journal* 42 (1999), 961-83. Other examples that Bentham also mentions are the Roman Commonwealth (*IPML*, 200, 196) and the Achaean league (*Comment/ Fragment*, 489). As to the Roman Commonwealth, see also Hart, *Essays on Bentham* (Oxford, 1982), 227; and Andrew Lintott, *The Constitution of the Roman Republic* (Oxford, 1999).

29 *IPML*, 200.

30 *Limits*, 53.

31 Bowring, vol. 4, 353. Besides, Bentham writes that the multitude of sovereigns over the same people, 'may be consider'd as composing all together but one sovereign'. (*Limits*, 42, 91-2). Hart cannot understand 'why, as Bentham states, they [the member sovereigns] may be considered as composing one sovereign although they never act together and their respective legislative powers are not derived from any law defining their scope.' (Hart, *Essays on Bentham*, 233) Hart's puzzle is not concerned with situations like the Swiss Cantons, the Dutch Provinces, or the United States of America, in all of which the Cantons or Provinces or States compose a collective sovereign by acting together in the field of action which is outside the authority of each Canton or Province or State. As to the German Empire, what Bentham means is, perhaps, that the German states are subject to the Emperor in some sorts of act or dimensions, perhaps cultural or spiritual, and thereby in these particular aspects, the German Empire as a political society does exist. It is unlikely that Hart is denying the statehood of the republic of Switzerland, the Netherlands, the German Empire, and the United States of America. So exactly what Hart is really puzzling about here is not easy to detect.

32 Bowring, vol. 9, 644-5. Bentham uses the word 'federative' interchangeably with 'confederate'.

one source of law for the same individuals, who may thus live under more than one system of law. Bentham's view is that, depending upon people's disposition to obedience regarding different spheres of human action, there may be several distinct sovereigns on the same territory or for the same people, and therefore there may be more than one legal system operating within a particular political community, and directing the different actions of the same people or of different peoples on the same territory.

1.3. Operative Sovereignty and the EU

In light of Bentham's notion of operational sovereign, can the EU be regarded as such, similar to federated entities in line with the Holy Roman Empire, the United Dutch Provinces, and the Helvetic Republic? It is uncontested that the Member States of the EU have operational sovereignty, since they are independent states. However, those states have set up a legal person, the EU, which is based on its own legal system, separate from the legal systems of the Member States.[33] Furthermore, the Member States have bestowed the EU with its own competences, most of which are shared, but some of which are exclusive.[34] Furthermore, once the EU has acted in the field of a shared competence, the Member States lose the power to act to the extent the EU has acted.[35] In addition, due to the primacy of EU law, Member States will have to give priority to their obligations under EU over their national law, when the EU rule has direct effect.[36] Consequently, above the Member states of the EU is a separate entity, with its own legal system that has priority over the legal system of the Member States and with its own competence that has been conferred by the Member States upon the EU. Therefore, the EU, a special body, with its own powers over the Member States, may potentially constitute an operative sovereign. Whether this is the case depends on the obedience of the subjects of the EU.

The subjects of the EU are in the first place its Member States, since they derive rights and duties from the Treaty of Lisbon. The Member States have the guarantee that the EU can only exercise the powers which have been explicitly

33 Article 47 Treaty on European Union.

34 Articles 3-4 Treaty on the Functioning of the European Union.

35 Article 2 (2) Treaty on the Functioning of the European Union; ECJ, Case 22/70, *Commission v. Council (ERTA)*, 31 March 1971, [1971] ECR 263.

36 ECJ, Case 6/64, *Costa v. E.N.E.L.*, 15 July 1964, [1964] ECR 585; ECJ, C-573/17, C*riminal proceedings against Daniel Adam Popławski*, [EU:C:2019:530], para 53-68; Declaration (No. 17), annexed to Lisbon Treaty, concerning primacy, [2010] OJ C83/344.

or implicitly bestowed upon it,[37] and that these powers can only be exercised on the basis of the principle of subsidiarity and proportionality[38]. The Member States have a duty to implement and enforce EU measures and to cooperate loyally with the EU.[39] Since the relationship between the EU and the Member States is one between different public authorities, similar to that between federated entities and the federal level, habitual obedience of the subjects is not secured through the use of police or military powers, but through legal means. In this regard, EU law provides for an action by the European Commission when a Member State does not comply with its obligations under EU law.[40] In such case, the European Commission may bring an action before the European Court of Justice to compel the Member State to cease its infringement of EU law. If after the judgment, the Member State continues to infringe EU law, the European Court of Justice may impose a lump sum or fines.[41] Furthermore, habitual obedience is evidenced by the continued membership of the Member States in the EU. Unlike states, since the EU does not have its own police or military forces, it cannot coerce the member states to remain part of the EU. The Treaty of Lisbon even provides in its Article 50 for a procedure of leaving the EU. Hence, a Member State, which refuses to continue to obey the EU may always opt to leave it, such as is the case with the United Kingdom.

Besides the Member States, natural and legal persons are equally subject to EU law, unlike other international organisations. Although most of the time EU rules will be incorporated in the national law of the Member States, the EU legal system has established direct bonds with individuals. Firstly, primary EU law gives certain rights to nationals of Member States: each national of a Member State is equally a European citizen, with *inter alia* the prohibition of discrimination on the basis of nationality,[42] the right to freely move and reside in other Member States,[43] and to vote and stand candidate for municipal elections and elections of

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37 Article 5 (1)-(2) Treaty on European Union; ECJ, Case 22/70, *Commission v. Council (ERTA)*, 31 March 1971, [1971] ECR 263.

38 Article 5 (3)-(4) Treaty on European Union; Protocol (No. 2), annexed to the Lisbon Treaty, on the application of the principles of subsidiarity and proportionality, [2010] OJ C83/206.

39 Article 4 (3) Treaty on European Union; Article 291 (1) Treaty on the Functioning of the European Union.

40 Article 258 Treaty on the Functioning of the European Union. Member States may also bring actions for infringement of EU law: Article 259 Treaty on the Functioning of the European Union.

41 Article 260 Treaty on the Functioning of the European Union.

42 Article 18 Treaty on the Functioning of the European Union; direct effect: ECJ, Case C-85/96, *Martinez Sala v. Freistaat Beieren*, 12 May 1998, [1998] ECR I-2691.

43 Article 21 Treaty on the Functioning of the European Union; direct effect: ECJ, Case C-413/99,

the European Parliament[44]. In addition, economically active persons also benefit from the freedom of movement to work or establish themselves in other Member States.[45] Goods, services and capital (and payments) of economic actors may also move freely between the Member States.[46] All these freedoms have direct effect and can therefore be relied upon immediately by individuals.[47] Apart from these freedoms, the Charter of Fundamental Rights protects the rights of EU citizens against the EU (and the Member States acting within the scope of EU law).[48] Primary EU law equally provides for obligations primarily in the field of competition[49] and permits the EU to impose sanctions upon individuals and companies in the field of external action, for instance when they have links with terrorist organisations.[50] Secondly, secondary EU law equally creates rights and obligations for individuals. EU Regulations are directly applicable and do not require any transposition by the Member States, unless this is required.[51] They

Baumbast and R. v. Secretary of State for the Home Department, 17 September 2002, [2002] ECR I-7091.

44 Article 22 Treaty on the Functioning of the European Union; implemented by: Council Directive 93/109/EC of 6 December 1993, laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, [1993] OJ L329/34; Council Directive 94/80/EC of 19 December 1994, laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in municipal elections for citizens of the Union residing in a Member State of which they are not nationals, [1994] OJ L368/38.

45 Articles 45 and Article 49 Treaty on the Functioning of the European Union.

46 Goods: Article 28 and Articles 34-35 Treaty on the Functioning of the European Union; services: Article 56 Treaty on the Functioning of the European Union; capital and payments: Article 63 Treaty on the Functioning of the European Union.

47 Persons: ECJ, Case 41/74, *Van Duyn v. Home Office*, 4 December 1974, [1974] ECR 1337; goods: ECJ, Case 26/62, *Van Gend en Loos NV v. Nederlandse Administratie der Belastingen*, 5 February 1963, [1963] ECR; services: ECJ, Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 3 December 1974, [1974] ECR 1299; capital and payments: ECJ, Joined Cases C-163/94, C-165/94 and C-250/94, *Sanz de Lera and Others*, 14 December 1995 [1995] ECR I-4821.

48 Article 6 (1) Treaty on European Union; the EU has a general obligation to respect human rights, including those in the Charter: ECJ, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation*, 3 September 2008, [2008] ECR I-6351, para. 284. For the duty of Member States to respect fundamental rights when applying EU law: ECJ, Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 15 May 1986, [1986] ECR 1651.

49 Articles 101-102 TFEU; ECJ, Case 127/73, *BRT v. SV SABAM and NV Fonior*, 27 March 1974, [1974] ECR 51; ECJ, Case 155/73, *Sacchi*, 30 April 1974, [1974] ECR 409.

50 Article 75 Treaty of the Functioning of the European Union; Article 215 (2) Treaty of the Functioning of the European Union.

51 Article 288 Treaty on the Functioning of the European Union; ECJ, Case 34/73, *Fratelli Variola S.p.A.*

therefore may directly create rights and duties for individuals. More complicated is whether individuals may derive rights and obligations from Directives, the most common means of EU legislation, since Directives only state the objectives that the Member States have to achieve, but give the Member States the discretion on how to achieve these objectives.[52] Nonetheless, Directives can be directly relied upon by individuals against Member States when the Member States have failed to timely or correctly implement them.[53] Consequently, individuals are also subjects of the EU law, which in certain competences acts as the law of their operative sovereign.

2. Structure of the operative sovereignty of the EU

Sovereignty, according to Bentham, can be divided or distributed among different branches, and shared conjunctively by different bodies.[54] The holders of different branches of the sovereignty are not sovereigns in and by themselves: they each constitute part of a conjunctive sovereign. Bentham illustrated this point in his explanation of an institutional arrangement which anticipated the American judicial review, which was only articulated twenty-seven years later by John Marshall in *Marbury v. Madison*. That arrangement gives judges the power to annul the legislator's acts, and thereby, according to Bentham, transfers 'a *portion* of the supreme power' to the judges. Some might suggest that this arrangement transfers at once the supreme authority from the legislator to the judges, but Bentham disagrees, and argues that 'this would be going too far on the other side', because what is transferred is a negative power and the transfer is done upon reasons given, which is widely different from and much inferior to the positive power of making a law. In the power distribution represented by this arrangement, Bentham claims, sovereignty is not reposed in any one body of persons: the constantly exercised power of legislating is possessed by the legislator, the occasionally exercised power of judging the legislator and of executing the

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v Amministrazione italiana delle Finanze, [1973] ECR 981. IF the Regulation has direct effect, i.e. is clear and precise and not leaving any margin of discretion for the authorities, it may also be invoked by individuals against other individuals: ECJ, Case C-253/00, *Antonio* Muñoz *y Cia SA en Superior Fruiticola SA tegen Frumar Ltd en Redbridge Produce Marketing Ltd.*, [2002] ECR I-7289.

52 Article 288 Treaty on the Functioning of the European Union.

53 ECJ, Case 41/74, *Van Duyn v. Home Office*, 4 December 1974, [1974] ECR 1337; however an incorrectly or untimely implemented Directive cannot be invoked against other individuals: ECJ, Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, 26 February 1986, [1986] ECR 723; ECJ, Case C-91/92, *Faccini Dori v. Recreb Srl*, 14 July 1994, [1994] ECR I-3325.

54 *Comment/Fragment,* 485; *IPML*, 263-264n; *Limits*, 91-2.

judgment, is possessed by the judiciary. 'The sovereignty', points out Bentham, 'would not be exclusively in either: it would be conjunctively in both.'[55]

Whereas Bentham in the first place considered habitual obedience to various sovereigns for different parts of human activities, the EU is not similar in this respect. The EU was set up by states which have operative sovereignty over human activities in their territories. The Member States through the exercise of their own operative sovereignty nevertheless decided to collectively bestow operative sovereignty on another entity for certain areas of human activities. In return, they are extensively involved in the functioning of the EU, this involvement, however, does not necessarily undermine the operative sovereignty of the EU. This would only be the case if the Member States would have the sole decision-making power which they exercise collectively and by consensus. In such instance, the operative sovereignty of the EU would merely be a chimera, a thin veil behind which the Member States would hide the collective exercise of their operative sovereignty.

The role of the Member States in the EU is important, but this by no means undermine the operative sovereignty of the EU. The Member States are represented in two institutions of the EU: the European Council and the Council.[56] The European Council decides by consensus, but can in principle not take any legislative action;[57] rather it is a body in which the Member States set out political guidelines, appoint important EU functionaries, and, on occasion, settle political disputes between themselves.[58] However, legally binding decisions are made by the Council, in principle according to the ordinary legislative procedure.[59] Yet, in the legislative procedure, the Council is only one institution in the process of law-making and has to act together with the Commission and the European

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55 *Limits,* 91n; see also *Comment/Fragment*, 488.

56 Article 15 (2) Treaty on European Union; Article 16 (2) Treaty on European Union.

57 Article 15 (1) Treaty on European Union. The European Council generally makes non-binding resolutions, but may on occasion make binding decisions, especially in the area of the Common Foreign and Security Policy: Article 22 (1) Treaty on European Union ('decisions of the European Council shall be implemented'). See also: Article 26 Treaty on European Union.

58 Article 15 (1) Treaty on European Union; more specifically: Article 68 Treaty on the Functioning of the European Union; Article 121 (2) Treaty on the Functioning of the European Union; Article 148 (1) Treaty on the Functioning of the European Union; Article 22 (1) and Article 26 (1) Treaty on European Union; Article 31 (2) Treaty on European Union; Article 48 Treaty on the Functioning of the European Union; Article 83 (2)-(3) Treaty on the Functioning of the European Union; Article 86 (1) Treaty on the Functioning of the European Union; Article 87 (3) Treaty on the Functioning of the European Union.

59 The major exception to the ordinary legislative procedure is the Common Foreign and Security Policy, where the European Parliament and the Commission have a reduced role. The European Court of Justice equally does not jurisdiction over this competence: Article 24 Treaty on European Union.

Parliament. It is the Commission that has the sole right to initiate law-making procedure by presenting a proposal to the European Parliament. If the European Parliament has approved the proposal by simple majority, the Council has to adopt it by a qualified majority of votes. If in the first reading the Council does not accept the proposal, as accepted by the European Parliament, both the Council and the European Parliament must in a second or third reading pass the proposal. If there is no simple majority in the European Parliament in favour of the proposal, or the qualified majority of votes cannot be reached in the Council, the proposal will not be adopted.[60] From this brief overview, it is clear that the Member States, through the Council, do not have the sole sovereignty in making laws, but have to share this power with the Commission, the initiator of the legislative process, and the European Parliament. Hence, the law-making branch of sovereignty is exercised by the Council, European Parliament, and the Commission conjunctively. In any event, the Council cannot be equated with the Member States, but is a separate EU institution.[61] This is evidenced by the possibility of the Member States to bring a legal action against the Council, both of which can be supported by other Member States.[62]

The Member States are equally involved in the implementation and enforcement of EU law through their administration and courts. Although the Member States have a certain discretion in implementing and enforcing EU law, at least for Directives,[63] they are under an obligation to faithfully and loyally execute EU law.[64] In this regard, Lenaerts and Van Nuffel refer to the relation between the Member States and the EU as *Vollzugsföderalismus*, i.e. executive federalism.[65] When they fail to implement or execute EU law adequately, the Commission may start an action against them for their infringement of EU law.[66] In addition, every individual or legal person may ask a national tribunal or court for a preliminary ruling on the issue whether EU law has been correctly transcribed into national legal systems.[67] If the European Court of Justice finds that this is not the case, the national court will have to apply EU law due to its primacy. Consequently,

60 Article 294 Treaty on the Functioning of the European Union.

61 Article 13 (1) Treaty on European Union; Article 16 Treaty on European Union.

62 Article 263, para. 2 Treaty on the Functioning of the European Union; Article 265, para. 1 Treaty on the Functioning of the European Union.

63 Article 288 Treaty on the Functioning of the European Union.

64 Article 4 (3) Treaty on European Union; Article 291 (1) Treaty on the Functioning of the European Union.

65 K. Lenaerts and P. Van Nuffel, *European Union Law*, London, Sweet & Maxwell, 2011, p. 688.

66 Article 258 Treaty on the Functioning of the European Union.

67 Article 267 Treaty on the Functioning of the European Union.

in exercising their power to implement and execute EU law, the Member States act as subsidiary authorities under the supervision of the Commission and the European Court of Justice.

Finally, with regard to the branch of the judiciary, it is the European Court of Justice which has the sovereignty, as the principal judicial body of the EU. The European Court of Justice settles all legal disputes between the EU institutions, between the EU institutions and the Member States. Furthermore, although EU law is applied by national courts and administrations in situations involving individuals and legal persons, the European Court of Justice guarantees the consistency of EU law in the different Member States through the mechanism of the preliminary ruling. It also hears appeals on points of law from the General Court, which focuses on annulment procedures launched by individuals.[68] Hence, it is the European Court of Justice which has the final authority in the judicial branch.

To conclude, the overview of the three different functions traditionally associated with sovereignty, that is, the legislative, executive and judicial function, demonstrates that the operative sovereignty of the EU is conjunctively exercised by the European Parliament, Council, Commission and the European Court of Justice, with the Member States playing an important role in all three branches, but not the exclusive or even primary role.

3. The EU as a limited operative sovereign

Although the previous sections have demonstrated that the EU is an operative sovereign, the EU was constituted as an entity with various legal limitations: it has to respect primary EU law, i.e. the treaties upon which it was founded, which includes the cardinal principle of conferral of powers and the fundamental rights of individuals, and it also has to respect the rule of law.[69] Consequently, two issues arise. Firstly, since the Member States have created the EU, with all its limitations, and have the power to amend the EU treaties,[70] should they not be considered the operative sovereign, considering they have the power to terminate the EU, or less drastically to change the EU? Secondly, if the EU is nonetheless the operative sovereign, how can it be limited by law? For Bentham law was characterized by sanctions to guarantee the obedience of its subjects. However, an operative sovereign cannot sanction itself for its infractions against the limitations imposed on it, which raises the question whether constitutional law is law.

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68 Article 256 (1) Treaty on the Functioning of the European Union.

69 For the values on which the EU is founded: Article 2 Treaty on European Union.

70 Article 48 Treaty on European Union.

Bentham's theory on sovereignty hints at answers to these conundrums. In the course of writing *Limits*, Bentham introduced the distinction between laws *in populum* and *in principem*. The ordinary sort of laws, i.e. laws having inferiors as passible subjects, is termed laws *in populum*. Laws *in principem* are 'laws to which no other persons in quality of passible subjects can be assigned than the sovereign himself', and they are classified as the 'transcendent class of laws'.[71] Laws *in principem* therefore 'prescribe to the sovereign what *he* shall do: what mandates *he* may or may not address to *them* [the subjects]; and, in general, how he shall or may conduct himself towards them'.[72] The distinctiveness, or 'the essential and characteristic feature' of laws *in principem* consists in 'the quality of the parties who are respectively bound by them'. They are addressed to, and impose obligations on, the sovereign: 'either the sovereign himself who issues them, (the sovereign for the time being) or to his successors, or (what is most common) to the one as well as to the other.' For the sovereign-issuer himself, laws *in principem* may be termed *pacta regalia* or royal covenants; for his successors, recommendatory mandates.[73] On laws *in principem* 'the people found what are called their liberties'.[74] They comprise 'privilèges réservés ou accordés à là masse originaire de la nation: comme liberté de conscience, liberté de culte, droit de port d'armes, droit de confédération, etc'.[75] 'In this respect they are like treaties with foreign powers ...They are a sort of treaties with the people. '[76] Bentham's examples of laws *in principem* include: the Magna Carta, the Bill of Rights, the American charters by the British Parliament, the Act of Union; the Act of Mediation of 1738 imposed on Geneva by Bern, Zurich and France, which served as the constitution of Geneva until 1782, the Treaties of Westphalia of 1648, part of which served as the constitution of the Holy Roman Empire until 1805; the arrangement regulating the relation between the *Pays d'Etats* and the central government under the *Ancien* Régime in France.[77] Laws *in principem* are law, although their sanction is different from the sanction of laws *in populum*. They have binding force from moral and religious sanction and they therefore can be effectual. The sovereign as the maker or the covenantor, and the moral and religious sanction as the guarantee of its binding force, combine

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71 *Limits*, 86, 256.

72 *Limits*, 86.

73 *Limits*, 86-90, also 256.

74 *Limits*, 252-6.

75 Uc xxxiii 79, quoted in JH Burns, 'Bentham on Sovereignty: an Exploration', in *Bentham and Legal Theory*, published by *Northern Ireland Legal Quarterly* (1973), ed. MH James, 144.

76 *Limits*, 38; 39.

77 *Limits*, 93, 266-7; *Comment/Fragment*, 488-489.

to make directives *in principem* laws: 'without the covenantor, there would be no law at all; without the guarantee … none that *can be* effectual. The law, then, may in strictness be consider'd as the work of both: and, therefore, in part, of either'.[78] Since religious sanctions are not likely in contemporary polities, moral sanction is the more likely sanction, which is manifested through public opinion.

Bentham's distinction between laws *in populum* and laws *in principem* have generated much debate and he has not always been clear regarding whether laws *in principem* are laws. Despite this, some tentative extrapolations may be drawn from the notion of laws *in principem*. First, from the examples adduced by Bentham, it is clear that the creators of a constitution of a polity may not be the operative sovereign thereof. The Treaties of Westphalia of 1648 had constitutional significance for the Holy Roman Empire, but this does not entail that the parties to these agreements, which included France, Spain, the Dutch Republic, and Sweden, were the operative sovereign of the Holy Roman Empire. More contemporary examples strengthen this point: Switzerland, the United States, Germany, … were all the results of confederations and federations between sovereign entities, but this does not entail that these entities are the operative sovereign in these states. Similarly, although the EU was created by the Member States, it does not lead to the conclusion that they are therefore the operative sovereign. Second, the existence of laws *in principem* do not undermine the existence of an operative sovereign in a given polity. Hence, although the EU is a limited sovereign, it still has operative sovereignty in certain competences. Third, the guarantee of respect for laws *in principem* lies ultimately with the censure of public opinion. At first glance, this seems not the case in the EU, in which the European Court of Justice plays a crucial role in guarding against overstepping EU law by the institutions and the Member States. EU acts that are not based on primary EU law will be annulled so that there is a legal sanction against violating the laws *in principem* of the EU. Yet, this raises the perennial question: 'sed quis custodiet ipsos custodes'? The European Court of Justice is the supreme arbitrator, but how can this supreme arbitrator held in check the interpretations which would undermine the political compromises upon which the EU was founded? In the end, this can only be the public opinion of the European citizens. Through their Member States or through the European Parliament that represents them, the public may put pressure in order for them to propose amendments to the Treaties and to counter judgments of the European Court of Justice which are deemed to have unduly applied EU law.

78 *Limits*, 90.

4. Conclusion

The paper has demonstrated that according to Bentham's theory on sovereignty and his distinction between laws *in populum* and laws *in principem*, the EU is a political society created by its Member States and maintained by its subjects' disposition to obey its laws made by its own institutions. Although the Member States of the EU have created the EU, and may also terminate it, they do not have operative sovereignty above the EU. Therefore, it is not the Member States that collectively have sovereignty. Rather, by giving up and pooling their sovereignty, they have constituted a new operative sovereign with its own powers and competences. In return, the Member States play an important role in the functioning of the EU, but have to share their power with other institutions, which conjunctively form the operative sovereign. Although the EU has its own operative sovereignty, it does not follow that it is not legally limited. In line with Bentham's notion of laws *in principem*, the EU is limited by its own laws, the binding force of which finally depends upon the tribunal of public opinion.