T.M.C. ASSER INSTITUUT

Founded in 2008, the Centre for the Law of EU External Relations (CLEER) is the first authoritative research interface between academia and practice in the field of the Union's external relations. CLEER serves as a leading forum for debate on the role of the EU in the world, but its most distinguishing feature lies in its in-house research capacity, complemented by an extensive network of partner institutes throughout Europe.

Goals

- To carry out state-of-the-art research leading to offer solutions to the challenges facing the EU in the world today.
- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the EU external policy process.
- To build a collaborative network of researchers and practitioners across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

Assets

- Complete independence to set its own research priorities and freedom from any outside influence.
- A growing pan-European network, comprising research institutes and individual experts and practitioners who extend CLEER's outreach, provide knowledge and practical experience and act as a sounding board for the utility and feasibility of CLEER's findings and proposals.

Research programme

CLEER's research programme centres on the EU's contribution in enhancing global stability and prosperity and is carried out along the following transversal topics:

- the reception of international norms in the EU legal order;
- the projection of EU norms and impact on the development of international law;
- coherence in EU foreign and security policies;
- consistency and effectiveness of EU external policies.

CLEER's research focuses primarily on four cross-cutting issues:

- the fight against illegal immigration and crime;
- the protection and promotion of economic and financial interests;
- the protection of the environment, climate and energy;
- the ability to provide military security.

Network

CLEER carries out its research via the T.M.C. Asser Institute's own in-house research programme and through a collaborative research network centred around the active participation of all Dutch universities and involving an expanding group of other highly reputable institutes and specialists in Europe.

Activities

CLEER organises a variety of activities and special events, involving its members, partners and other stakeholders in the debate at national, EU- and international level.
CLEER's funding is obtained from a variety of sources, including the T.M.C. Asser Instituut, project research, foundation grants, conferences fees, publication sales and grants from the European Commission.

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS
T.M.C. Asser Instituut inter-university research centre

CLEER is hosted by the T.M.C. Asser Instituut,
Schimmelpennincklaan 20-22
2517 JN, The Hague, The Netherlands

CLEER

E-mail: info@cleer.eu
Website: http://www.cleer.eu

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

CLEER

The EU as a democratic polity in international law

Jaap Hoeksma

CLEER WORKING PAPERS **2011/2**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

THE EU AS A DEMOCRATIC POLITY IN INTERNATIONAL LAW

JAAP HOEKSMA*

CLEER WORKING PAPERS **2011/2**

* Jaap Hoeksma is philosopher of law and director of Euroknow.

ISSN 1878-9587 (print)
ISSN 1878-9595 (online)

Printed in The Netherlands
T.M.C. Asser Institute
P.O. Box 30461
2500 GL The Hague
The Netherlands
www.cleer.eu

1. INTRODUCTION

The process of European integration that started after World War II, has not resulted in the creation of a new State. It has, nevertheless, contributed to an unprecedented spread of democratic governance on the European continent. While the initial impetus may be ascribed to the activities of the Council of Europe, founded in 1949 with a view to promote human rights, democracy and the rule of law, the European Communities (EC) and their successor the European Union (EU) have been and will continue to play an essential role in the process. The ambition of the EC, as an organisation for economic cooperation, was limited to the promotion of democracy at the level of the member states. As a political entity, however, the EU also aspires to be a democracy of its own. The Lisbon Treaty signifies a major development in this respect as it places the functioning of the EU upon the principle of representative democracy, while it simultaneously emphasizes the sovereignty of the member states. The paradoxical outcome of the process of European integration is therefore that the EU has not become a state and yet forms a democracy.

The purpose of the present essay is to analyse how the European Union has gradually evolved into a democratic polity of states and citizens. By combining the disciplines of international law and political theory, the analysis provides ample arguments for the conclusion that, following the entry into force of the Lisbon Treaty, the EU may be described as a Union of democratic states based on the rule of law, which also constitutes a law-based democracy of its own.

2. THE WESTPHALIAN SYSTEM OF INTERNATIONAL RELATIONS

It has taken the new concept more than half a century to be developed. Although the origins can be traced back to the earliest stages of the integration process, the new concept received its actual form only with the entry into force of the Lisbon Treaty on 1 December 2009. Moreover, it has appeared especially difficult for theorists and practitioners to recognise the new phenomenon as it challenges the prevailing system of international relations. This system owes its name to the Peace of Westphalia (1648) and holds that the idea of democracy can only come to fruition in the context of a national state. Seen from the perspective of the Westphalian system of international relations, the EC/EU should either become a sovereign state or remain an intergovernmental organisation. *Tertium non datur*.[1]

[1] The connection between the Westphalian system of international relations and the 1933 Montevideo Convention on Rights and Duties of States has been illuminated by W. van Gerven, *The European Union: a polity of states and peoples (*Stanford, Stanford University Press 2005), at 36. See also: M. Telò, *International Relations: A European Perspective* (Burlington, Ashgate 2009), 8-11.

This conceptual opposition has been dividing the member states ever since the foundation of the Communities in the middle of the 20th century. Politicians and scholars alike have been deadlocked in a debate about the end goal *or finalité politique* of the process for more than fifty years. Some analysts even came up with the theory of the *paradox of the finalité politique*, according to which progress in the field of European integration can only be made if and as long as the subject of the end goal remains unspoken.[2] Consequently, the antagonists agreed to disagree and to describe the EC/EU with a neutral term as an organisation *sui generis*. Unfortunately, however, this focus on conceptual premises has prevented the participants in the debate from realising that the EU has in the meantime evolved into a new kind of polity with a distinct form of democracy. The situation is more or less the reverse of the one in the fairy tale, in which the emperor walked through the streets without clothes on. In the present case, the European Union has developed into a new political entity without the antagonists being able to see it.

3. THE POWER OF PARADIGM

This conclusion may be underpinned with a brief indication of the importance of the Westphalian system for understanding the EU. In the preamble to the Treaty of Rome the participating states expressed their determination to lay the foundations for 'an ever closer union between the peoples of Europe'. This formula has gained acceptance over the years as a carefully drafted compromise between the proponents of a federal approach resulting in the creation of a United States of Europe and the supporters of intergovernmental cooperation who favoured a *Europe des Patries* or Union of Nation-States. Although the two schools of thought have been portrayed and perceived as irreconcilable, they are both rooted in the Westphalian system of international relations with its strict separation of national and international public law. In this system, the relation between states and citizens is the exclusive domain of national public law, whereas citizens have no role to play in the relations among states. Consequently, the concepts of citizenship and democracy can only be used in the context of a national state. Applied to the character of the developing EC/EU, this approach unavoidably results in a contradistinction between democracy at the level of one sovereign federal state or at that of a number of sovereign states, i.e. between a federation and a confederation. In the first case, the participating states will have to renounce their sovereignty in favour of the new state, while their citizens are required to cede their national status for a common citizenship. In the second case, there can neither be citizenship of nor democracy in the organisation. A rigid application of the Westphalian system of international relations to the process of European integration would thus leave the EU no other choice but to either develop into one democratic Euro-

[2] J. Rood, M. van Keulen, B. Limonard, *Nederland, de EU en het Verdrag van Lissabon* (Den Haag, Nederlands Instituut voor Internationale Betrekkingen Clingendael 2008), at 38.

pean state or to bolster the concept of democracy at the level of the sovereign member states.

The power of the Westphalian paradigm is so strong that the shared presumption of two adversary schools of thought that there is no third solution available has largely remained uncontested. Although efforts have been made to describe the EU in negative terms as an 'Unidentified Political Object (UPO)'[3], as a 'post-imperial empire'[4] or, more modestly, as a 'federal *non*state'[5], the prevailing paradigm has in fact prevented the opposing parties from investigating whether their fundamental hypotheses are still correct and valid. Yet, there is strong evidence from other legal fields to suggest that the divide between national and international public law is not as rigorous as it used to be during the first half of the twentieth century, notably not with respect to the protection of human rights – both on the global and the regional level-, the promotion of the rule of law, the crime of genocide, the introduction of international criminal justice and to the recently started debate about the constitutionalisation of international law.[6]

The present essay envisages to demonstrate a) that the preambular phrase 'ever closer union between the peoples of Europe' possesses autonomous meaning, b) that it is feasible to understand the European Union as a political entity beyond the scope of the Westphalian system of international relations and c) that the EU actually forms the first species of a transnational democracy.

4. THE TREATY OF ROME

The preamble to the Treaty of Rome, which was concluded in 1957 by France, Germany, Belgium, Luxembourg, The Netherlands and Italy, contains two derogations from the habitual language of international law at the midst of the twentieth century. It speaks on the one hand of 'union between the peoples of Europe' and on the other of the 'pooling of resources'. The noun 'peoples' does not fit into the semantic field of the Westphalian concept of international relations which has developed an elaborate system of alliances of states, unions of states, federal states and unitary or nation-states. In the terminology of the prevailing paradigm, the preamble should therefore have spoken of an ever closer union between the states of Europe. The end goal of this union could either have been to develop into an overarching United States of Europe or to strengthen the independence of the participants in the framework of a confederal Europe of United States.

---

[3] Jacques Delors, see J. Zielonka, *Europe as Empire. The Nature of the Enlarged European Union* (Oxford, Oxford University Press 2007), at 4.

[4] José Manuel Barroso quoted in H. Mahony, *Barroso says EU is an 'empire',* available at: <http://euobserver.com/9/24458>.

[5] See M. Plattner, 'Competing Goals, Conflicting Perspectives', 14 *Journal of Democracy* (2003), 42-56.

[6] See J. Klabbers, A. Peters & G. Ulfstein (eds.), *The Constitutionalisation of International Law* (Oxford, Oxford University Press 2009).

The second deviation from the standard language of the Westphalian system in the preamble to the Treaty of Rome lies in the concept of the 'pooling of resources'. The pooling of resources, which was limited initially to the sector of coal and steel, implied a pooling of sovereignty. However, since the reception of Jean Bodin's *Six livres de la République* in the 16th century the sovereignty of a state was supposed to be one and indivisible.[7] This political idea has been reinvigorated after the end of the Napoleontic adventures in 1815 and as such constituted the basis for the emergence of the nation-state in the 19th century. The pooling of sovereignty is therefore incompatible with the concept of the nation-state. From the point of view of the initiators of the process of European integration, however, the absolute power of the nation-states had to be curbed in order to avoid a recurrence of the previous devastating wars. The most efficient and pragmatic way to achieve this goal was to make it impossible for the former belligerents to declare and conduct war. The first of the three European Communities, the European Coal and Steel Community (ECSC), which was founded in 1951, did so by placing the production of coal and steel under a common, supranational authority. The participating states pooled sovereignty in order to prevent war. This method proved to be so effective that the deception over the failure in 1954 to implement the hugely ambitious plans for a European Defence Community and a European Political Community was soon overcome. Adopting a more pragmatic attitude instead, the participating states decided to continue the experiment of supranational cooperation, but to limit the expansion of its scope in the Treaties of Rome of 1957 to the economy (European Economic Community, EEC) and to the peaceful use of atomic energy (Euratom).

Although it may, in hindsight, seem a perfectly reasonable proposition to share sovereignty in order to prevent war, for contemporary scholars and politicians it meant a revolutionary breakthrough of the existing patterns of international relations.[8] In fact, the theoretical ramifications of this change of paradigm are such that the European Union has not yet come to terms with them half a century onwards.

5. UNCHARTED WATERS

A first indication of the seriousness of the consequences which the new approach could have, was given by the Court of Justice of the European Communities in the cases of Van Gend en Loos and Costa v. ENEL.[9] The Court held that, by transferring the exercise of sovereign powers to the European

[7] Van der Pot-Donner et al., *Handboek van het Nederlandse staatsrecht* (Zwolle,Tjeenk Willink 1972), at 16.

[8] C.W.A. Timmermans, 'The Genesis and Development of the European Communities and the European Union', in P.J.G Kapteyn & P. VerLoren van Themaat (eds.), *The Law of the European Union and the European Communities* (Alphen aan de Rijn, Kluwer Law International 2008), 1-51, at 7.

[9] Cases C-26/62, *Van Gend & Loos v. Netherlands Inland Revenue Administration, 5* February 1963; C-6/64, *Flaminio Costa v. ENEL*, 15 July 1964.

Economic Community, the member states had in fact created a new legal order of international law. The Court started its considerations by pointing out that the Treaty of Rome was more than a traditional treaty inasmuch as it was not limited to creating mutual obligations between the contracting states. In reaching this conclusion, the Court relied heavily on the preamble of the treaty, 'which refers not only to governments, but also to peoples'. The involvement of the peoples as such led the Court therefore to conclude that the process of European integration departed from the traditional patterns of international cooperation. The Court saw its view confirmed by the fact that the EEC had been given 'institutions endowed with sovereign rights, the exercise of which affects member states and also their citizens'. The Court approached these citizens not only as nationals of the member states, but also as participants in the Community since they were 'called upon to cooperate in its functioning through the intermediary of the European Parliament and the Economic and Social Committee'. It went on by saying that the law of the Communities not only imposes obligations on the individuals, but that 'it is also intended to confer upon them rights, which will become part of their legal heritage'.

The importance of these verdicts for the theory of international relations lies in the effort of the Court to clarify the consequences of the departure from the traditional modes of international cooperation. Although the Court describes the human beings affected by the Community as 'individuals' or as 'nationals of the states' or as 'citizens of the member states', it establishes that these persons play a role in the functioning of the Community. In doing so, the Court of Justice not only paves the way for the introduction of a citizenship of the EC/EU, but also sketches the outlines of a new kind of polity beyond the state. In hindsight it would almost seem as if the Court intended to encourage the member states to proceed on their common journey by exploring the uncharted political waters for them. The effect of the verdicts was, in any case, that the Community had been identified as a new legal order and that, as the citizens were called upon to cooperate in its functioning, this new order could be transformed in a more or less distant future into a democratic polity.[10]

6. IDENTITY AND DEMOCRACY

The verdicts of the Court were delivered at a time of high tensions in the then still fragile Communities. The disagreement between France and the other five member states concerning the introduction of qualified majority voting was reaching its climax, while the application of the United Kingdom for membership of the organisation increased existing anxieties. It was only after the Luxembourg Accord of January 1966 had settled the dispute with France and after the United Kingdom, Ireland and Denmark had acceded to the Communities, that a first resonance of the Court's verdict could be heard. In the Declaration

[10] In the same sense also: P. Pescatore, 'Van Gend en Loos, 3 February 1963-A View from Within', in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford, Hart Publishing 2010), at 6.

on European Identity, which the Heads of State and Government of the nine participating countries endorsed at their summit in Copenhagen on 14 December 1973, they expressed their determination to construct a 'united Europe' and their intention to transform their existing relations into a European Union before the end of the decade.[11] In doing so, the member states presented themselves for the first time as a 'distinct and original entity'. Article 10 of the Copenhagen Declaration is indicative of the new spirit where it says that the Nine, *acting as a single entity*,[12] will strive to promote harmonious and constructive relations with third countries. Although the Declaration laid emphasis on the relations of the Communities with the outside world – an intention which was highlighted by the unannounced visit of a delegation of Arab countries to the summit, the Nine commenced their self-presentation with an analysis of their internal identity. They expressed their determination to defend the principles of representative democracy, of the rule of law, of social justice and of respect for human rights, thereby defining these values as fundamental elements of the European identity.

Having transformed the character of their meetings through the creation of the European Council in 1974, the Heads of State and Government issued two declarations at their summit of April 1978 in – again – Copenhagen. While the one served to fix the date for the first direct elections of the European Parliament in 1979, the other dealt with the concept of democracy in the context of the process of European integration. The Declaration on Democracy,[13] as it was called, can be regarded as a concretisation of the blueprint drawn up by the Court of Justice in the case of Van Gend en Loos. While the Court considered that the citizens of the member states were called upon to cooperate in the functioning of the Communities, the European Council described the forthcoming direct elections of the European Parliament as 'a clear expression of the common democratic ideal of the peoples of the member states'. As the members of the European Council repeated their determination, expressed in the Declaration on European Identity, to defend the principles of representative democracy, of the rule of law, of social justice and of respect for human rights in a separate paragraph, the common democratic ideals of the peoples of the member states can only refer to the democracy these peoples have in common.

The importance of the Declaration on Democracy lies in the fact that the European Council applies the principle of democracy both on the level of the member states and on that of the Communities. The Declaration on Democracy may therefore be regarded as the European Council's first public step away from the end goal of a federal state towards a new kind of polity with a distinct form of democracy.

---

[11] See EC Bulletin 12-1973.
[12] Ibid.
[13] See EC Bulletin 3-1978.

7. TOWARDS EUROPEAN UNION

The protection of human rights and the promotion of democracy received a major impulse with the foundation of the Conference on Security and Cooperation in Europe (CSCE) during the early seventies. Established at a time of détente between East and West, the CSCE (now an 'Organization' known as the OSCE) prepared the ground for a long-awaited and yet unexpected process of change. The monitoring of human rights, which was foreseen in the Helsinki Final Act, contributed over a 15 year period to the overthrow of communist rule and to the introduction of democratic governance in a large number of Central- and Eastern European countries.

Although the role of the EEC in the elimination of the Iron Curtain was rather limited, it was active and instrumental in preparing the formerly fascist dictatorships Greece, Portugal and Spain for accession. In doing so, the EEC lived up to the promise contained in article 4 of the Declaration on European Identity, which extended an open invitation to 'other European nations who share the same ideals and objectives' to participate in the construction of a United Europe. The commitment to democracy proved especially important when a military coup threatened a return to authoritarian rule in the Kingdom of Spain in 1981.

The transformation of the existing relations between the member states into a European Union required more time and resolve than originally expected. In the absence of tangible progress at the level of the Council, the European Parliament took the initiative of drafting a constitution for the nascent Union. The draft, adopted in 1984, underlines the democratic character of the member states, introduces a citizenship of the Union and stipulates in article 3 that the EU-citizens shall take part in the political life of the Union.[14] In hindsight, a striking similarity with the verdict of the Court of Justice in the Van Gend en Loos case can be discerned. While the Court pointed out that the nationals of the member states are called upon to cooperate in the functioning of the Community, the Parliament envisages that they shall, in their capacity of EU-citizens, participate in the political life of the Union.

Despite the apparent lack of progress, the European Council adopted two documents in this period which seem to confirm the emergence of a consensus concerning the democratic structures of the European house. The Solemn Declaration on European Union, signed in Stuttgart on 19 June 1983,[15] considers on the one hand that 'the European idea corresponds to the wishes of the democratic peoples of Europe, for whom the European Parliament is an indispensable means of expression' and confirms on the other hand that 'respect for and maintenance of representative democracy and human rights in each member state are essential elements of membership of the European Communities'. As if to underline this approach, article 1 of the Solemn Declaration changes the phrase 'ever closer union between the peoples of Europe' into 'ever closer union between *the peoples and the Member States of the Euro-*

[14] See EC Bulletin 2-1984.
[15] See EC Bulletin 6-1983, 26-32.

pean Community' (italics added*).* Although the Single European Act, signed in Luxembourg on 17 February 1986, did not repeat the latter formulation, it explicitly reiterated the two-track approach to democracy which was to become the conceptual hallmark of the European Union.

8. A UNION OF STATES AND OF PEOPLES

Speculation was rife in the months preceding the meeting of the European Council in Maastricht on 9 and 10 December 1991 that the creation of the EU would imply an important step, if not giant leap in the direction of a federal European state. These expectations were fuelled by a Franco-German proposal to refer in the text of the treaty to the 'federal vocation' of the European Union. Under pressure from the eurosceptic rebels in his Conservative Party the then British Prime-Minister John Major, however, insisted that the f-word should disappear and be replaced with the undisputed original phrase of 'ever closer union between the peoples of Europe'.[16] As a result of prolonged deliberations the phrase was not only included in the preamble of the new treaty, but also formed part of the first article, according to which the Treaty on European Union 'marks a new stage in the process of creating an ever closer union between the peoples of Europe, in which decisions are taken as closely as possible to the citizen'. The last sentence of the first article goes on by pointing out that the task of the Union shall be to organise (…) relations between the Member States and between their peoples. Moreover, the Maastricht Treaty also uses the term 'peoples' in connection with the European Parliament. Article 137 stipulates that the EP shall consist of 'representatives of the peoples brought together in the Community'. The triple appearance of the term 'peoples' in the Maastricht Treaty has led eminent scholars to conclude that the EU can thus be described as a Union of States and of Peoples.[17]

In line with the direction set out in the Declarations on Identity and Democracy the Maastricht Treaty follows the path towards a system of dual democracy in the Union. The principle that member states must meet fundamental requirements of democracy, is explicated in article F, paragraph 1, which says that 'the Union shall respect the national identities of the Member States, w*hose systems of government are founded on the principles of democracy*' (italics added). On the other track, the preamble expresses the desire of the contracting parties 'to enhance further the democratic and efficient functioning of the institutions'. At first glance, it would appear that this intention has been realised by the attribution of more, although not yet sufficient, powers to the European Parliament. With the benefit of hindsight, however, it may be argued that the creation of EU-citizenship by the Maastricht Treaty has been its greatest con-

[16] See P.J.G. Kapteyn et al., *Inleiding tot het recht van de Europese Gemeenschappen: na Maastricht* (Deventer, Kluwer 1995), at 33.

[17] C.W.A. Timmermans, 'General Aspects of the European Union and the European Communities', in P.J.G Kapteyn & P. VerLoren van Themaat (eds.), *The Law of the European Union and the European Communities*, (Alphen aan den Rijn, Kluwer Law International 2008), 1-51, at 55. The same conclusion is drawn by Walter van Gerven, cf note 1.

tribution to the development of a democratic system of governance at the level of the Union.[18]

9. EU-CITIZENSHIP

The notion of EU-citizenship caused considerable confusion at the time of its introduction. Seen from the perspective of the Westphalian system of international relations, this confusion was fully justified. The idea to attach citizenship to an international organisation was not only unprecedented, but also theoretically impossible. In the prevailing system, citizenship of an international organisation is an absolute anomaly. The concern, expressed by the Danish voters in the 1992 referendum about the Maastricht Treaty, that the new EU-citizenship would replace their national status, was therefore entirely understandable. In a concerted action the Danish government and the European Council succeeded in persuading the sceptical, if not suspicious voters to approve the disputed treaty through a second referendum. The Danish government issued a unilateral declaration, in which it stated that citizenship of the EU is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system: 'Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-State*'*.[19] For their part, the other eleven Heads of State and Government confirmed in a conclusion adopted at the summit in Edinburgh on December 1992 that the new status only gives additional rights to the nationals of the member states and that it does not in any way take the place of national citizenship.[20]

It should be recalled at this juncture that the rights attached to the new citizenship by the Maastricht Treaty were of a very limited nature. Critics were even able to argue that the newly proclaimed citizens enjoyed these rights already on the basis of the rules and regulations concerning the internal market.[21] In their analysis, the right of a citizen to consular protection in a third country, in which the member state of which he is a national is not represented, could hardly be regarded as a substantive justification for the introduction of an entirely new status. This apparent lack of content only served to foster the suspicion that 'Brussels' had a double agenda to the effect that the introduction of EU-citizenship would ultimately lead to the creation of an EU super-State. In hindsight it seems rather remarkable that the European Council and the EU institutions were not able to dismiss these allegations by outlining their own vision of a future European Union. At the time, however, the Heads of State

[18] Apart from this, the Maastricht Treaty should of course also be credited for establishing the Economic and Monetary Union (EMU), which was to lead to the introduction of the common currency of the Union.

[19] See Unilateral Declarations of Denmark, EC Bulletin 12-1992.

[20] See EC Bulletin 12-1992.

[21] See P.J.G. Kapteyn et al., *Inleiding tot het recht van de Europese Gemeenschappen: na Maastricht* (Deventer, Kluwer 1995), at 112.

and Government were still deadlocked over the Westphalian proposition that the EU should either evolve towards a full-fledged federal state or strengthen the sovereignty of the member states in a traditional confederation.

10. PATTERNS OF DEMOCRATISATION

The European Union came into existence on 1 November 1993. It has often been compared to a Greek temple with three pillars. The first pillar contained the original EEC, which was transformed by the new treaty into the European Community, while the other two dealt with Foreign Affairs and Security on the one hand and Justice and Home Affairs on the other. In the first pillar democratic control was to be exerted by the European Parliament, whereas the national parliaments of the member states had to check the activities of their governments in the second and the third pillar. It followed from this structure that the Court of Justice of the EC was only competent to deal with cases originating from the first pillar.

Despite the belief in many quarters that the process of European integration could have thrived only in the context of the Cold War, the EU did not hesitate to support and welcome the new democracies in Central- and Eastern Europe. Economic assistance was initially provided through the PHARE-programme[22], while the Europe Agreements, which were concluded afterwards with a number of partner states, were specifically meant to prepare the candidate countries for membership of the EU. As a matter of consequence, the European Council sharpened the criteria for accession to the EU at the summit in – once more – Copenhagen on 21 and 22 June 1993. The Council notably stated that membership requires 'that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.[23] Coincident with underlining the importance of democracy for the accession of new member states, the European Council also introduced a system of supervision over the democratic character of the member states. According to the Treaty of Amsterdam (1997) the rights of a Member State may be suspended in case of a serious and persistent breach of the values underlying the Union. Having started as an organisation for economic cooperation, the EU gradually revealed itself as a fierce proponent of democracy. This development was further strengthened by the increasing importance of the citizenship of the Union. In December 2000 the European Council formally proclaimed the Charter of Fundamental Rights of the EU, while the Court of Justice concluded shortly afterwards that 'citizenship of the Union is destined to be the fundamental status of nationals of the Member States'.[24] For the citizens of the time, however, these patterns were hard to recognise. Consequently, the EU was perceived and portrayed as an undemocratic organisation

[22] Created in 1989, the programme was called 'Poland and Hungary: Assistance for Restructuring their Economies.

[23] See EC Bulletin 6-1993.

[24] Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve,* 20 September 2001.

by some because it was said to weaken the notion of national citizenship and by others because of a lack of democratic control. The American author Marc F. Plattner neatly captured the mood by suggesting in an article in the Journal of Democracy of July 2002 that 'it is difficult to imagine how the EU could be genuinely democratized without undermining the sovereignty of its member states'.[25]

11. A DECADE OF CONSTITUTIONAL DEBATE

The decade of constitutional debate which followed may serve to demonstrate that it is principally impossible to understand and appreciate a new political phenomenon in terms of a foregone paradigm. The debate was triggered by the German Minister for Foreign Affairs, Joschka Fischer, who sketched the outlines of a federal European state in his speech at the Humboldt University in May 2000.[26] His bold suggestions immediately led to reactions from leading politicians, including Heads of State and Government, and to a newspaper debate with his French counterpart Jean-Pierre Chevènement, during which the latter ominously stated that 'Europe is a thing for which lawyers have no name'.[27] For his part Mr Fischer pointed out that federation was the only feasible political term to describe the EU.

The Belgian Prime-Minister Guy Verhofstadt formalised Fischer's initiative a year later by convincing the European Council to adopt the Laeken Declaration on the Future of the EU. The Declaration foresaw the convocation of a Convention for Europe, in which delegates from the member states and the candidate countries were to participate. The delegates, moreover, did not only represent the governments of these states, but also their parliaments. Although the means of a convention was relatively new and the methods were in many aspects innovative[28], the Convention failed to consider whether the proposed construction of the new EU could still be described and communicated in terms of the old paradigm of international relations. While this apparent lapsus may be explained by the delicate compromise concerning the 'finalité politique' of the EU, it proves beyond doubt that the members of the Convention were unaware of the fact that they were crossing a theoretical Rubicon. In endorsing the proposal of the President of the Convention to present the final document to the public as a 'Constitution for Europe', the European Council exactly repeated the mistake it made with the Maastricht Treaty. Just like the initial treaty was rejected by the Danish electorate out of fear that the introduction of EU-citizenship was poised to lead to the creation of a EU super-State, the Constitution for Europe was turned down by the French and the Dutch voters

[25] M. F. Plattner, 'Globalization and Self-Government', 13 *Journal of Democracy* (2002), 54-67, at 64.

[26] J. Fischer, *From Confederacy to Federation. Thoughts on the Finality of European Integration*, available at: <http://www.macalester.edu/courses/intl372/docs/joschka_fischer_en.pdf>.

[27] J-P. Chevènement, *Le face-à-face Chevènement-Fischer,* Le Monde, 21 june 2000.

[28] The method of a Convention was applied earlier for drafting the Charter of Fundamental Rights of the EU.

on the presumption that the adoption of an EU Constitution would ultimately result in the foundation of a federal European super-State. This unfortunate chain of events plunged the EU into a constitutional crisis which was to last for over two years.

12. THE LISBON TREATY

An important but so far unnoticed feature of the Lisbon Treaty, which brought an end to the agonising crisis, is that the word 'peoples' has all but disappeared as a constitutive element in the construction of the EU. While the peoples are duly referred to in the preambles of the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU), which together form the Lisbon Treaty, article 1 TEU no longer entrusts the EU with the dual task to 'organise relations between the Member States and between their peoples'. Moreover, the term has also ceased to be used in connection with the composition of the European Parliament. Whereas the previous treaties prescribed that the EP should consist of 'representatives of the peoples brought together in the Community', article 10, paragraph 2, TEU unambiguously states that the citizens are directly represented at the Union level in the European Parliament'. As the first paragraph of the same article stipulates that the functioning of the Union shall be founded on representative democracy, it may be suggested that the Lisbon Treaty brings about a fundamental change in the nature of the European Union. While the EU has been described on the basis of the Maastricht Treaty as a Union of States and of Peoples, the Lisbon Treaty constitutes a further evolution of the EU into a Union of states and citizens. This finding is corroborated by the fact that the new treaty not only uses the term 'the Union and its citizens', but also speaks of 'the Union and its Member States'.

At the same time the new treaty strengthens the position of the citizens of the Union by stating in article 6 TEU that the Charter of Fundamental Rights of the EU shall have the same legal value as the two founding treaties. In doing so, the Lisbon Treaty completes the development initiated by the Court of Justice in its famous Van Gend en Loos-verdict. While the Court described the nationals of the states brought together in the Community as bearers of individual rights and obligations on the one hand and as participants in the political life of the Community on the other hand, the Lisbon Treaty finalises this process by granting full political rights to the citizens of the EU, while simultaneously recognising their civil rights through the inclusion of the Charter of Fundamental Rights in the legal framework of the EU. The determination to protect the rights of the Union-citizens is reinforced by the forthcoming accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[29]

Moreover the Lisbon Treaty explicitly draws the consequence of its intention to construct the EU as a Union of Citizens and Member States by involving the national parliaments in the legislative process of the EU. It seems obvious that,

[29] Article 6 (2) TEU.

if citizens are represented in parliaments both on the national and on the Union level, these parliaments should not only have distinct responsibilities, but also co-ordinate their activities. Thus, article 12 TEU prescribes that draft legislative acts of the Union shall be forwarded to the national parliaments of the member states in order to enable them to guarantee that the principles of subsidiarity and proportionality are fully respected. The Protocol on the application of the principles of subsidiarity and proportionality contains detailed procedures for taking the views of the national parliaments into account (yellow and orange cards). Finally, it should be mentioned that article 11 TEU also introduces an element of direct democracy by giving the citizens a right of initiative with respect to EU-legislation. Discussions on how this provision should be implemented, have in the meantime been initiated by the European Commission and approved by the European Parliament.[30]

13. BEYOND SCYLLA AND CHARYBDIS

The conclusion that can be drawn at the close of this essay is that the resolve of the founders of the European Communities to establish an ever closer union between the peoples of Europe has led to the emergence of a new kind of polity with a distinct form of democracy. This polity has been identified and described by the Dutch parliament with a new legal-political term as a Union of Citizens and Member States.[31] The hypothesis submitted at the start of the present essay, that the phrase 'ever closer union' possesses autonomous meaning, has therefore been confirmed. It has not only served for about fifty years as a compromise between federalists and intergovernmentalists, but it has also played a major conceptual role in the process of overcoming the Westphalian system of international relations by pointing at the possibility of a new kind of polity beyond the existing phenomena of federations and confederations. Consequently, it has also been established that the wish to create an ever closer union between the peoples of Europe has resulted in the foundation of a Union of Citizens and Member States. To put this conclusion in terms of international relations theory: the EU demonstrates that the idea of transnational democracy is feasible in the form of a Union of Citizens and Member States.[32]

Once this supposition has been confirmed, it becomes possible to answer the question as to why the original Treaty on European Union, signed on 7 February 1992 in Maastricht, ventured to introduce EU-citizenship in the first place. Remarkable as it may seem in hindsight, the answer is simply that citizenship is an indispensable requirement for any democracy, including the type of representative transnational democracy which the European Union aspires

[30] See Regulation (EU) No 211/2011 of 16 February 2011 on the citizens' initiative, OJ L65/11.

[31] Second Chamber of the States-General, 2008-2009, 31.702, nr 3.

[32] Although cosmopolitan theorists tend to draw parallels between the Kantian concept of the 'ius cosmopoliticum' and the present EU, it seems from the legal perspective all but questionable whether Kant's Westphalian perception of international law leaves room for the EU experiment in pooling sovereignty.

to uphold. The Heads of State and Government were clearly unaware of this underlying tendency in their reaction to the unilateral declaration of Denmark in 1992 that nothing in the TEU would lead towards the creation of a Union citizenship in the sense of the citizenship of a nation-state. While the presumption emanating from this declaration is valid within the boundaries of the Westphalian paradigm, it has lost its meaning – and no longer poses a threat – in the post-Westphalian context. As long as the only alternative to the continuation of a confederation lay in the creation of a federal state, this presumption and these underlying fears were both correct and justified. However, this Kantian dilemma – as it may be called with reference to the famous philosophical essay on *Perpetual Peace*[33] – is only relevant if international law is and continues to be equated with the prevailing Westphalian system. Although Kant postulated a third sphere of law, the EU is solving the dilemma in an unforeseen manner. It seeks to avoid being trapped between the Scylla of a mere federation of free states and the Charybdis of a European super-State by developing into a democracy of its own. The EU not only requires its member states to uphold stringent criteria of democracy and the rule of law – as Kant would have demanded-, but it also exerts authority over its member states and its citizens in a democratic manner. From this perspective it would only seem natural that the democratic structures at the level of the Union are not yet full-grown. Actually, there is much room for further improvement in the democratic structures of the EU. The present shortcomings should, however, not prevent theorists and practitioners from realising that the EU is in the process of evolving towards a union of democratic member states which also constitutes a democracy of its own. On the contrary, such a conclusion may well prove to be a political prerequisite for a series of sustained efforts to turn the EU into a better democracy and a more legitimate Union.

14. A POLITY CALLED EU[34]

The most convincing means of explaining the unprecedented character of the EU is to accentuate that the European Union not only consists of states, but also of citizens. Citizenship of the Union is the fundamental status of the nationals of the member states. In a recent ruling the Court of Justice[35] has explicated this approach by concluding that the national authorities of a member-state are not allowed to take measures, which have the effect of depriving EU-citizens of the genuine enjoyment of the substance of their rights as citizens of the Union.[36] The scope of this verdict is not limited to citizens exercising their right

[33] For a detailed analysis from a cosmopolitan perspective, see G.W. Brown, *Grounding Cosmopolitanism: from Kant to the idea of a cosmopolitan constitution* (Edinburgh, Edinburgh University Press 2009).

[34] The term polity has been introduced in the debate about the nature of the EU by Ph. Schmitter, *Governance in the European Union* (London, Sage 1996).

[35] Following the entry into force of the Treaty of Lisbon, the name of the Court has changed to Court of Justice of the European Union.

[36] Case C-34/09, *Ruiz Zambrano v Office national de l'emploi (ONEm)*, 8 March 2011.

of free movement, but has been extended explicitly to situations in which the citizens concerned have remained and continue to remain inside the country of their nationality. Citizenship has thus become a constituent part of the European Union.

The second line of argument sets out to explain that the member states of the European Union are sharing sovereignty in a transnational organisation without renouncing their independence. As the international state practice shows, the member states do not only continue to recognise each other's sovereignty, but they are also treated as sovereign states by third parties.

The following step in the new construction seeks to ensure that the exercise of sovereignty at the level of the Union shall be effectively controlled by a directly elected parliament at the corresponding level. By realising this ambition the European Union has evolved over the years into a new kind of polity with a distinct form of democracy, which can no longer be explained in terms of the traditional Westphalian system of international relations. Thus, the EU has become a polity of democratic member states which also constitutes a democracy of its own. The purpose of the polity is to maintain peace and to guarantee the rule of law, to further prosperity, to strengthen its member states and to give the citizens a common sense of belonging, direction and destiny. The aim is, in short, to give the European Union a future in the globalised world of the 21th century.

Finally, it may be argued that the combination of legal analysis with international relations theory provides sufficient ground for the conclusion that the EU as a Union of Citizens and Member States actually constitutes the first species of the emerging category of transnational democracies. Seen from this perspective, the evolution of the EU into a new kind of polity may even serve as a blueprint for the future of regional organisations in other parts of the world.

15. CRITIQUE

The fact that the European Union may be described with a new legal-political term as a Union of Citizens and Member States forms no reason for complacency whatsoever. On the contrary, the EU will have to face and overcome a number of major, if not Herculean challenges if it is to establish itself as a lasting and reliable transnational democracy. Its first and foremost task is to familiarise the citizens with their new status. After the negative experiences during the decade of constitutional debate a special effort has to be made in order to communicate in plain and simple terms what the EU is, what the purposes of the Union are and why the commitment of citizens is crucial for the new polity to prosper. Fortunately, the Lisbon Treaty contains a starting point for such a process as article 10, para 4, TEU unequivocally states that political parties at European level contribute to forming European political awareness and to expressing the will of the citizens of the Union. This provision aims to ensure the democratic character of the EU as a Union of Citizens and Member States. In reality, however, the system of electing the European Parliament, which dates from 1976, is organised exclusively along national lines. Citizens have

no other possibility but to elect national candidates unless they have taken up residence in another member state. In that case, however, they are prevented from voting for a candidate of their own nationality. This outdated anomaly obviously contravenes the spirit and letter of the Lisbon Treaty and should be addressed at the earliest opportunity, i.e. prior to the EP-elections of 2014.[37] There is, after all, neither democracy without an electorate nor legitimacy without citizens.

A challenge of similar magnitude is for the EU to assert its identity at the global level. On the one hand the EU will have to deal – in the matters within its competence – with such powerful partners as the USA, Russia and China who are still firmly rooted in the traditional system of international relations. On the other hand the Union still has to secure its place in the system of the United Nations, which also continues to be dominated by the Westphalian paradigm. As if to underline the need for change and adaptation, the Lisbon Treaty has even had the adverse effect of weakening rather than strengthening the place of the EU in the UN system. An attempt to upgrade the position of the EU from an ordinary observer into that of an enhanced observer at the General Assembly and its working groups dismally failed in 2010.[38]

The need for self-assertion of the EU is also increasingly felt in the financial world. The idea of a common currency is as irreconcilable with the Westphalian system of international relations as the pooling of sovereignty. The traditional belief that a currency must be supported by a national state or shall cease to exist, still dominates the minds of the markets.[39] As a result, the euro has not yet attained the measure of stability that was originally envisaged, notably by the Bundesbank. This unfortunate situation can only be redressed if the competent monetary and political authorities of the EU succeed in demonstrating that it is possible for sovereignty to be exercised in a determined manner by common institutions at a transnational level.

Finally, a critical remark must be made with respect to the state of democracy within the EU. While the European Union actively supports democracy in third countries[40] and also requires the member states to uphold stringent standards of democracy and the rule of law[41], it still needs to come to terms with the idea that it constitutes a democracy in itself.[42] The very fact that the EU

---

[37] See Draft Report of the Committee on Constitutional Affairs on a Proposal for a Modification of the Act Concerning the Election of the Members of the European Parliament, EP 2010/XXXX(INI) of 12 April 2010.

[38] For a detailed analysis, see M. Emerson et al., *Upgrading the EU's Role as a Global Actor*, available at: <http://www.ceps.eu/ceps/download/4135>.

[39] See T. Padoa-Schioppa, *Markets and government before, during and after the 2007-20xx crisis*, available at: <http://www.bis.org/>.

[40] See Conclusions on Democracy Support in the EU's External Relations, doc 16081/09 of 18 November 2009.

[41] Article 7 TEU.

[42] As revealed by the President of the European Commission José Manuel Barroso who portrayed the EU as the first 'non-imperial empire in history' at a press conference on 10 July 2007. U. Beck and E. Grande made the next step by describing the EU as 'Empire Europe', in Neyer & Wiener (eds.), *Political Theory of the European Union* (Oxford, Oxford University Press 2011), 21-46.

continues to present itself on the Europa server and in the media as 'a unique economic and political partnership between 27 democratic European countries',[43] is a clear indication of the prevailing lack of self-awareness. The inability of the European Commission to account for the changing nature of the EU was highlighted once again in February 2011. Despite strong suggestions from the European Parliament to adapt the communication about the EU to the contents of the Lisbon Treaty, the Commission insists on describing the EU in terms of a Union of States.[44] It is therefore of vital importance for EU-politicians to acknowledge that the European Union has evolved into a democratic polity of 500 million citizens and 27 Member States. The first and foremost task of EU communication is to prepare the citizens for their role in this new polity. Evidently, the European Union should not content itself with being a transnational democracy on paper, but rather endeavour to further develop the present construction into a living democracy.[45]

[43] Available at: <http://europa.eu/>.

[44] E-10958/10EN, Answer given by Ms Reding on behalf of the Commission on 14 February 2011.

[45] In doing so, the EU may also meet the conceptual demand formulated by Walter van Gerven in 2009 that 'the EU should develop into a political entity with a high degree of democratic legitimacy'. See W. Gerven, 'Wanted: More Democratic Legitimacy for the European Union', in J. Wouters, L. Verhey and Ph. Kiiver (eds.), *European Constitutionalism beyond Lisbon*, (Antwerp, Intersentia 2009), at 18.