

Federal Trust Essay

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Replacing the Westphalian System

Essay on the Identification of the EU as a democratic Union of democratic States

From the outset, lawyers have underlined the revolutionary character of the process of European integration. In the first edition of the renowned *Introduction to the Law of the European Communities*, published in 1973, Kapteyn qualified the construction of the European Coal and Steel Community as a 'revolutionary breakthrough from the classic pattern of international organization'.¹ Many legal scholars have subsequently participated in the 'Integration through Law (ITL) project, but their efforts and conclusions have had little resonance with the wider field of European Integration Theory.² Political theorists, studying European integration, tend to operate with more political concepts such as neo-functionalism, liberal intergovernmentalism and postfunctionalism. Overlooking legal contributions, they prefer to present these three schools of thought as the 'Grand Theories of European Integration'.³ This lack of interdisciplinary dialogue is especially regrettable since political theorists have been unable so far to develop an own and distinct political philosophy of the European Union.⁴ In consequence, this 'academic provincialism' has led to an undue prolongation of the identity crisis of the EU, as epitomised by the notorious deadlock in the debate about the nature of the Union.

The aim of the present essay is to demonstrate that the perennial stalemate in the debate about the nature of the EU and the Future of Europe can be overcome through a democratic approach to the process of European integration. It will be established that the much-discussed democratic deficit, which used to characterise the EU in its early decades, has been addressed from within.

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The theory of democratic integration, to be summarised in this essay, postulates that, if two or more democratic states agree to share the exercise of sovereignty in a number of fields with the view to attain common goals, the organisation they establish for this purpose should be democratic too. The new theory not only underpins the conclusion that the EU in its present stage constitutes a 'democratic Union of democratic States', but also offers an explanatory model for its evolution from an association of democratic states to a European democracy. Mirroring this conclusion from the perspective of international relations it will be submitted that the EU has emerged as the first democratic regional organisation in the world.

The reception of citizenship

Hardly ever in the history of international law has a new concept been introduced with so much ignorance and opportunism as EU citizenship. The Heads of Government and State arrived at the summit of Maastricht in December 1991 with great expectations. The European Parliament had already drafted a federal blueprint for a European Union in 1984, while France and Germany had agreed to replace the established formula 'ever closer union' with the term 'federal vocation'.⁵ On the assumption that the President of the European Commission Jacques Delors aimed to complete the internal market, the Spanish government floated the idea to improve the status of their nationals in other member states by introducing a citizenship of the Union.⁶ As the proposal was endorsed without much discussion, one of the purposes of the newly founded Union was -in the words of article B TEU- to 'strengthen the position of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union'. As from the entry into force of the Maas-

tricht Treaty the citizens of the Member States were to be citizens of the Union too.

In line with the Internal Market-driven preparation of the introduction of the new status, however, the European Council did not attach any new rights or obligations to the citizenship of the Union. The citizens of the Union continued to enjoy the rights they had obtained in their capacity of subjects of the Member States, notably the right to free movement and settlement, but the Maastricht Treaty failed to contain any concrete measures to improve their position. Moreover, no propositions were made to connect those citizens of the member states, who preferred to remain in their own country with the newly established Union. Remarkable as it may seem from the present perspective, the citizens of the member states still had to cross an internal border in to 'validate' their status as EU-citizen.⁷

If there had been any hope in academic circles that the Heads of State and Government would have seized the momentous occasion of the Maastricht Treaty to address the democratic deficit of the European project, these expectations were dashed instantly after publication. The EU was described by one author as a 'Union of bits and pieces',⁸ while another concluded that the new status of EU-citizen was a 'pie in the sky'.⁹ The harshest criticism was still to come. At the height of the financial crisis, which was to hit the EU after the entry into force of the 2007 Lisbon Treaty, a leading commentator even concluded that 'democracy is not in the legal DNA of the EU'.¹⁰ His views were reflected by the German Constitutional Court, which concluded in its Maastricht-Urteil of 1993 that EU citizenship was not a 'real' status and in its Lissabon-Urteil of 2009 that the EU-democracy was not a 'real' democracy.¹¹ As these academic doubts and judicial judgements were corroborated by the prevailing paradigm in international law, known as the Westphalian system of international relations, the old continent seemed to be condemned to the Faustian dilemma of

either having international cooperation and economic prosperity or enjoying sovereignty and democracy.¹² In the prevailing perception international organisations were presumed to be incompatible with the concept of democracy. Democracy could only thrive within the boundaries of a sovereign state, whereas the relations between states were governed by the rules of diplomacy. In consequence, the EU could never be democratic and would always suffer from an intrinsic democratic deficit. Presented with this dogmatic dilemma the citizens of the United Kingdom decided in the 2016 referendum about the continuation of British membership of the EU to leave.¹³

Absolute sovereignty and beyond

The hallmark of the Westphalian system of International Relations lies in its concept of absolute sovereignty.¹⁴ Sovereignty (*summa potestas*) must be one and indivisible.¹⁵ It cannot be compromised. The emphasis on absolute sovereignty of States can be understood as a reaction to the feudal system of the Middle Ages, in which kings had vassals and in which Emperors and Popes competed for worldly power. As from the 16th century Europe became divided in an ever-fluctuating number of sovereign states, which were guided in their relations with each other by the Westphalian system. States had to treat each other as equals, they had to refrain from interfering in the internal affairs of other states and they were only allowed to declare war on another state if there was a valid *casus belli*.

Although the Westphalian system gradually became the global norm for the relations between states, the old continent of Europe proved to be too small for the system to remain the guiding principle in international relations. After two devastating world wars the citizens and politicians of the ravaged countries wanted 'no more war', even if that meant that they would have to give up or

share parts of their national sovereignty.¹⁶ In fact, the European Coal and Steel Community, which was founded in 1951 by six Western-European countries, was based on the premise that it would be materially impossible for states to declare war on each other, if they shared the exercise of sovereignty over the materials with which these wars were conducted.¹⁷ In practice, sharing sovereignty in a limited number of fields proved to be a reasonable price for the prevention of war.

The European countries proceeded very cautiously on their way to a more mature system of mutual relations. Later generations may judge that they took far too long. It seems at least stunning that – 70 years after the start of their experiment with shared sovereignty - they are still measuring the results of their exercise by the norms of the system which they have abandoned. To put it concretely: the political and academic debate about the nature of the EU is still dominated by the Westphalian opposition between states and international organisations.¹⁸ The reason for this outdated practice is probably that practitioners and researchers seem to be so accustomed to examining political relations from the Westphalian viewpoint of States, that they are mentally unable to swap their paradigm for another one. However, as the EU not only exists of states, but also of citizens, it should be endeavoured to substitute the civic perspective of democracy and the rule of law in the study of the EU for the Westphalian paradigm of diplomats and states.¹⁹

A New Narrative for the EU

Paradigm shifts tend to shed fresh light on accepted truths and persistent stalemates. In the case of the EU the change of paradigm renders the traditional opposition between state and international organisation obsolete. The axiom that it is impossible for international organisations to function on

a democratic footing is being replaced with the premise that, if two or more democratic states agree to share the exercise of sovereignty in a number of fields in order to attain common goals, their organisation will have to be democratic too. Substituting the democratic perspective for the diplomatic paradigm opens the way for identifying the emancipation of the citizen as a new dynamic in the process of European integration. In line with the practice of the European Council to mark each treaty as a new stage in the process of European integration, the evolution of the European polity from a Union of democratic States to a European democracy may be described in ten stages.

1) Sharing Sovereignty

The new narrative, which stems from the paradigm change, starts with the historic decision of six Western-European countries to prevent the renewed outbreak of war by sharing sovereignty over the materials required for the very conduct of war. The construction of the European Coal and Steel Community, founded in 1951, formed a 'revolutionary breakthrough of the existing patterns of international organisation'.²⁰

2) An autonomous legal order

Encouraged by the success of their experiment the six member states decided to broaden the practice of pooling sovereignty to the entire economy. The European Economic Communities, which was created by the 1957 Treaty of Rome, aimed at establishing an internal market among the participating states. In its landmark verdict in the case *Van Gend en Loos* of 1963 the EC Court of Justice found that the Community had an autonomous legal order.²¹ A year later the Court added that the law of the Communities has direct effect and, in case of conflict, precedes national laws and regulations.²²

3) A Union of democratic States

In the wake of the first enlargement in 1973 with three new members the European Council decided to identify the Communities as a 'Union of democratic States'.²³ While unions of states are a regular phenomenon in international law, unions of democratic states are rare, especially when they share the exercise of sovereignty in order to attain the goals they have in common. In view of the nature of the democratic principle it may be presumed that, if two or more democratic countries agree to share the exercise of sovereignty in a number of fields in order to attain common goals, the organisation they establish for this purpose should be democratic too.

4) A directly elected Parliament

In line with this theoretical presumption the nine member states decided three years later to increase the democratic legitimacy of their Communities by holding direct elections for the European Parliament. According to the 1976 Act concerning the election of the Members of the European Parliament by direct universal suffrage the candidates were to be chosen in each Member State by the electorate of that particular State. The voter turnout in the 1979 EP-elections stood at almost 62 %.

5) Qualified Majority Voting

The functioning of regular unions of state is based on the principle that no member state can be bound against its will. In other words, each participating state has the right of veto. National vetoes, however, are incompatible with the democratic decision making at the supranational level. Seen from this perspective the decision of the European Council to replace the national vetoes in a number of fields with a system of deciding by qualified majorities was an important step on the road towards a European democracy. The European Single Act, signed by twelve member states, entered into force on 1 July 1987.

6) EU Citizenship

The stakeholders in the process of European integration did not have a blueprint for the transition of their polity from a Union of democratic States to a European democracy. In hindsight, it seems obvious to suggest that citizenship is an indispensable condition for a democracy. As demonstrated above, however, the purpose of the European Council on introducing a citizenship of the Union was to complete the internal market rather than to lay the foundations for a democracy at the level of the Union. It was only after the initial Danish rejection of the Maastricht Treaty that the European Council tacitly withdrew its original motivation for the introduction of EU citizenship.²⁴

7) Dual Democracy

The 1997 Amsterdam Treaty is the first treaty in the history of the EU to contain the outline of the system of dual democracy, which has become the hallmark of the European Union. The Amsterdam Treaty includes democracy in the core values of the EU, presently enumerated in article 2 TEU. As it also introduced specific provisions to ensure durable compliance by the member states to the values of the Union, notably with respect to democracy and the rule of law, the Amsterdam Treaty allowed for the description of the EU as a 'Union of democratic States, which also constitutes a democracy of its own'.

8) Fundamental Rights

The Charter of Fundamental Rights of the European Union, solemnly proclaimed at the 2000 Summit of Nice, symbolises the emancipation of the citizens in the framework of the Union. It has been hailed as the 'Magna Charta' of EU citizens, since it contains both the political and the civil as well as the economic and social rights of the EU citizens. After it had obtained legal status by virtue of the entry into force of the Lisbon Treaty on 1 December 2009, EU

citizenship was no longer a 'pie in the sky', but a full-grown status of citizens of an international organisation. From then on, the citizens of the member states could take pride in saying: *Civis Europaeus Sum*.²⁵

9) The Lisbon Treaty

The 2007 Treaty of Lisbon is the first treaty in legal history to turn an international organisation into a transnational democracy. At the same time, it construes the EU as a democracy without turning the Union into a state. Article 10 (1) TEU articulates that the functioning of the Union shall be founded on representative democracy.²⁶ Seen in this light, the Lisbon Treaty symbolises the emergence of the EU as a new kind of entity in global politics, which can no longer be understood and explained in terms of the Westphalian paradigm of international relations. As the Lisbon Treaty puts beyond doubt that the EU is neither a State nor an international organisation, the question as to how the EU can be described in positive terms can no longer remain unanswered.

10) An autonomous democracy

The innovations brought about by the Lisbon Treaty proved to be so intricate that it took the EU Court of Justice more than a decade to come up with proper interpretations. The case law of the ECJ is vital for the understanding of the Lisbon Treaty both with respect to the status of EU citizens and in relation to the system of governance of the EU.

The ECJ started by turning EU citizenship into a real status. While citizens had to cross a border under the old regime in order to validate their rights in the framework of the EC/EU, the ECJ established in 2010 that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States'.²⁷ It followed that 'national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the

Union' are in conflict with European law.²⁸ The cross-border element had been removed so fundamentally that nationals of a member state who had been convicted to imprisonment by the judiciary of their country for breaking national laws, could successfully invoke their rights as EU citizens.²⁹

It lasted more than a decade after the entry into force of the Lisbon Treaty before the ECJ found itself in the position to articulate its views on the system of governance contained in that treaty. In two separate judgements, delivered on the same day, the Court recalled 'that, as stated in article 10 (1), the functioning of the EU is to be based on representative democracy, which gives expression to democracy as a value. Democracy is, under article 2 TEU, one of the values on which the EU is founded'. This fundamental provision forms the basis for the conclusion that the EU has an autonomous democracy and that the member states, while they are obliged to ensure free and fair elections for the European Parliament, must refrain from actions, which have the effect of undermining the EU democracy.³⁰

From the conceptual viewpoint, these verdicts of the ECJ underline that the EU has evolved beyond the Westphalian system. While the latter holds that it is impossible for organisations of states to be democratic, the Court establishes that the EU has an autonomous democracy. So, some seventy years after the start of the experiment with shared sovereignty a new kind of democracy has emerged at the European level, which does no longer comply with the demands and prescriptions of the Westphalian system. As the present essay shows, a new set of rules is developing, which may be described as the 'European Model of Transnational Governance' and which is characterised by the exclusion of war, by the practise of shared exercise of sovereignty, by an autonomous legal order as well as by dual citizenship and a dual democratic order.³¹

Conclusion

Political processes tend to take time, notably when they are not merely related to individual states but to an entire continent. Clear ideas are indispensable for bringing about the required foundational change. The ECJ should therefore be credited for clarifying the nature of the EU. Taking into account that the European Council described the then Communities in 1973 as a Union of democratic States, the finding of the ECJ that the European Union has an autonomous democracy, leads to the conclusion that the EU is to be identified in its present stage as *a democratic Union of democratic States*. Formulated in terms of international relations, this conclusion implies that the EU may present itself at the global stage as *a democratic regional organisation*.

The corona crisis from which the world is trying to recover, may serve to demonstrate that the long-awaited solution of the conundrum concerning the nature of the EU, does not mean that Europe's problems have all been solved. On the contrary, the challenges are formidable and the construction of the new European house is far from complete. However, the realisation that the EU has reached its constitutional destination as a democratic Union of democratic States, may enable the participants in the Conference on the Future of Europe to make the right diagnosis. They do not have to limit themselves to the prevailing three 'Grand Theories of European Integration' in their efforts to shore up their recommendations with solid foundations. They may conclude instead that, as Jürgen Habermas,³² Kalypso Nicolaidis³³ and Koen Lenaerts³⁴ each have demonstrated in their own way, that the constitutional-democratic approach is the path forward. Seen from this perspective, the main challenges for the European Union at this juncture are to strengthen its young and fragile democracy by all possible means, including digital and participatory democ-

racy, and to ensure continued respect by its member states for the values of the Union, notably for the values of democracy and the rule of law.³⁵ As the quality of democratic governance at the level of the Union is correlated to the democratic processes within each member state, it is essential for European democracy to be protected and nurtured on both levels. After all, European sovereignty is only feasible if it is balanced and controlled by an effective European democracy.

Endnotes

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- 29 Case Delvigne, ECLI:EU:C:2015:648
- 30 Cases Puppinck, ECLI:EU:C:2019:1113 and Junqueras Vies, ECLI:EU:C:2019:1115
- 31 The present author has given a full analysis of the European Model of Transnational Governance in 'The Case BundesVerfassungsGericht versus EU Court of Justice, supra note 11
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