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From 'Unidentified Political Object' to European Democracy

*Essay on the Unforeseen Democratization of the
European Union*

Global democratic backsliding has become such a dominant theme for political theorists in recent years that the unparalleled democratization of the European Union has gone largely unnoticed. The EU is criticized by some for its democratic deficit and by others for its failure to protect the rule of law. Both strands of criticism, however, overlook the fact that the EU is the first international organisation since the emergence of the Modern State System to have evolved to a transnational democracy. This essay aims to demonstrate that the EU has outgrown its notorious democratic deficit by applying the constitutional principles of democracy and the rule of law to an international organisation.

The main reason why scholars have failed to foresee this development, may well be that it was regarded as theoretically impossible. Political philosophers from all denominations held that the European polity, which started to emerge in the wake of the Second World War, had either to become a federal state or a confederal union of states. According to the Westphalian system of International Relations, which constitutes the prevailing if not exclusive paradigm in the field of public law, there were no other options available. As President of the European Commission, Jacques Delors reflected the creeping uncertainty by floating the term 'Unidentified Political Object', while scholars agreed to disagree by labelling the EU as an organisation *sui generis*. This academic compromise prevented researchers from observing that the EU was slowly but steadily abandoning the Westphalian system as the paradigm for its internal functioning. Seen in this perspective, the verdicts of the EU Court of Justice con-

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cerning the conditionality mechanism of 16 February 2022 may be regarded as the 'Act of Abjuration' by the EU of the Westphalian system.¹ This conclusion is as important for the study of public law and the humanities as the replacement of the Ptolemaic world vision by the heliocentric theory of Copernicus and Galilei has been for science. Thus, the essay ends with an open invitation to researchers from all disciplines involved to jointly chart the *terra incognita* in front of us and to explore in a common academic effort how the democratization of the EU can be theoretically underpinned and practically furthered.

THE NATURE OF THE BEAST

Scholars from various disciplines and nationalities appear to agree that the EU can not be defined. The Italian political theorist Simona Piattoni established in the conclusion of an impressive volume on the democratic principles of the EU in 2015 that 'the nature of the beast has not yet been determined'.² Her British colleagues Bellamy and Lacey suggested two years later that, although many books about political theory and the European Union have been written, there is not yet a political theory of the EU.³ The Finnish lawyers Rosas and Armati started their study on EU constitutional law by recalling the tale of the elephant and the seven blind men and concluded by conceding that it will probably never be possible to identify the nature of the Union.⁴ The collective findings of these respectable authors are confirmed by the German political theorist Ludger Kühnhardt who summarised the debate in 2022 by positing that there is not yet a history of political thoughts on the EU.⁵

Other scholars, judges, courts, politicians and member states argued that, whatever the EU might be, it was certainly not a democracy, let alone a constitutional democracy. At the height of the euro-crisis in 2012 the American law professor Weiler postulated that 'democracy is not in the legal DNA of the EU'.⁶ In a gloomy mood he continued with prophesying that the EU might annihilate its member states in a similar way as the Golem of Prague had turned on its creators. In a series of verdicts on major events in the development of the EU such as the foundation of the Union in 1992, the conclusion of the Lisbon Treaty in 2007 and the measures to save the euro as the EU's currency the German Constitutional Court found that EU citizens are not 'real' citizens, that EU democracy is not a 'real' democracy and that the EU Court of Justice cannot be

regarded as a 'real' Court.⁷ In line with the Westphalian dogma the BundesVerfassungsGericht held that, in the absence of a European people (demos), the EU cannot function as a democracy.⁸

In the course of the euro-crisis, the wish to return to Westphalia was voiced by the press in the United Kingdom too.⁹ The financial rhetoric contributed to the creation of a political climate in which prime minister David Cameron saw fit to announce an in-or-out referendum on British membership of the EU. Cameron used his Bloomberg speech of January 2013 to portray the European Union in pejorative terms as an undemocratic organisation.¹⁰ In the most remarkable *non sequitur* in living political memory he went on by suggesting that he himself would only vote for continuation of British membership if the EU became less democratic. No wonder then that radical adversaries of the EU saw his statement as the ideal springboard for launching their nostalgic attacks on the EU as the 'Fourth Reich'.¹¹

Another form of imperial nostalgia is displayed by philosophers, scholars and essayists favouring either a reincarnation of the Roman Empire,¹² a revival of the Middle Ages¹³ or a re-appreciation of the Austro-Hungarian Dual Monarchy,¹⁴ which has been brilliantly portrayed in its own time by the novelist Robert Musil as 'Kakanien' (kaiserlich und königlich).¹⁵ Obviously, these authors prefer to disregard the democratic hallmarks of the EU. As they are also unable to shed light on the role of the Union as an international actor on the global stage, the particular form of imperial nostalgia they represent will be left to their imagination.

THE CONDITIONALITY MECHANISM VERDICTS OF 16 FEBRUARY 2022¹⁶

The wish to return to the Westphalian concepts of unrestricted sovereignty and non-interference in internal affairs was also expressed by a number of member states in Central Europe, notably by Poland and Hungary. Populist politicians floated the opinion that they had not acceded to the EU in order to see Brussels substituted for Moscow. During the meeting of the European Council of October 2021 the leaders of these member states voiced their objections so vociferously that the outgoing German Chancellor openly raised the question in a press conference afterwards as to 'what we are? An association of states or an ever closer union?'¹⁷ Thus, these arguments were brought forward in the complaints of Poland and Hungary against the conditionality mechanism, contained in the Resilience and Recovery

Facility. The dissenting member states asked for the annulment of the regulation on the basis of the Westphalian argument that the system of oversight on the expenditure by the Commission amounted to outright interference in the internal affairs of sovereign states.

In assessing these existential claims the ECJ did not engage in a theoretical debate about the end goal or *finalité politique* of the EU but established on the basis of the Treaties that the values of article 2 TEU define the identity of the EU as a common legal order.¹⁸ In a similar way as it had found in 1963 that the member states had created an autonomous legal order by transferring sovereignty in a number of fields to the then Communities, the ECJ accentuated that these values are common to the constitutional traditions of the member states and form the basis of their shared endeavour to create an ever closer union. The Court notably considered in paragraph 124 that 'respect for the values of article 2 TEU is a prerequisite for the accession to the EU of any European State applying to become a member.' It went on by pointing out in the next paragraph that 'once a candidate State becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded.' As the EU functions by virtue of the mutual trust between the member states that those values will be recognised and that the EU law that implements them will be respected, 'compliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession.' On becoming a member, applicant states knowingly accept the obligations stemming from EU membership and continue to be bound by them until they free themselves thereof by voluntary withdrawing from the Union in line with article 50 TEU. Thus, the ECJ concluded in paragraph 127, 'the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.'

THE WESTPHALIAN SYSTEM OF INTERNATIONAL RELATIONS¹⁹

From a conceptual perspective, it may be suggested that the Conditionality Mechanism (CM) verdicts con-

stitute the 'Act of Abandonment' by the EU of the Westphalian system of International Relations. The ECJ does not invent a theory or develop a model, but merely establishes that the agreements, which the participating states have made with each other and with the EU, go far beyond the range of international commitments, made under the Westphalian system. Naturally, the Court leaves it to theorists to conclude that the EU has in fact superseded the traditional template with respect to its internal functioning. So, the CM-verdicts form the logical outcome of a process which started with the determination of the citizens of the countries on the old continent that they wanted no more war. After two devastating world wars in the 20th century and many more in the past, they refused to accept the inevitability of armed conflict any longer. In the Westphalian system, which used to serve as a code of conduct for the relations between states since the Early Modern Era, war was regarded as the continuation of diplomacy with other means. The hallmark of this system is that states are sovereign, while they deal with each other as equals. They do not have to recognise any higher authority and they are entitled to regard violations of their sovereignty as a cause for war (*casus belli*). While the Westphalian emphasis on absolute sovereignty of states may be explained as a reaction to the practice of diffuse sovereignty of the Middle Ages, it also resulted in a sharp division between constitutional law and international law. Constitutional law regards the relations between the state and its subjects/citizens as well as the internal organisation of that state, whereas international law consists of rules and principles concerning the relations between states as equal actors on the global stage. The domains of constitutional law and international law are strictly separated with the individual states as the nexus between two parallel universes. Over the centuries, the Westphalian model has gained such a measure of predominance that it was described by the Swiss-born French philosopher Jean-Jacques Rousseau as the eternal cornerstone of our international system.²⁰ Today, it forms the paradigm underlying the functioning of the United Nations and the distribution of international justice.

Although for centuries war had been accepted as being integral part of the ever-lasting order of things, the German philosopher Immanuel Kant challenged this conventional wisdom by writing an essay on Perpetual Peace.²¹ In his study 'Zum ewigen Frieden', published on the eve of the 19th century, Kant identified two options for war-weary states to guarantee perpet-

ual peace. They could either merge into an overarching federal state and ultimately a World Republic or form an association of free states. In Westphalian sovereignty terms, the participating states should either give up national sovereignty and transfer it to the overarching federal state or retain full sovereignty in an association of sovereign states.

THE COUNCIL OF EUROPE AS A UNION OF STATES

A comparison with its peer organisation the Council of Europe (CoE) may be helpful to understand the conceptual predicament of the EC/EU. Both organisations stand in the tradition of the Kantian quest for eternal peace. After the writings of the great philosopher of the Enlightenment had been banned by the Nazis, his ideas inspired the system of global governance elaborated by the 1945 Charter of the United Nations. In a similar way as the foundation of the European Communities, the adoption of the Charter was a reaction to the atrocities of the Second World War. The Charter forbids acts of aggression by states against the sovereignty, territorial integrity or political independence of another state. It is based on the Westphalian concept of absolute sovereignty and legitimises the use of force by States for the purpose of self-defence. Chapter VIII of the Charter authorises the creation of regional organisations of states for dealing with matters relating to the maintenance of international peace and security.

The Council of Europe was founded in 1949 as a regional organisation in the sense of the Charter of the United Nations. The organisation was notably established with the aim to promote democracy and human rights in the states of Europe. European states are not only welcome to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms but also to the European Social Charter, which is presented by the Council as the 'Social Constitution of Europe'.²² The CoE has a Parliamentary Assembly, consisting of parliamentarians from its Member States, as well as a European Court of Human Rights. The task of the Court is to ensure that States respect the rights and guarantees set out in the Convention. It may not only examine complaints of its Member States but also of individuals. Article 3 of the Convention, which prescribes that no one shall be subjected to torture or inhuman or degrading treatment, may even be invoked by refugees and asylum seekers. The Court's verdicts often result in the adaptation of

contested legal provisions by the Member States. Despite its specific qualities, however, the CoE has no democratic aspirations of its own and remains safely within the borders of the Westphalian paradigm.

STAGES TOWARDS EVER CLOSER UNION

Seventy-seven years after the end of the Second World War the European continent forms the theatre of vicious warfare once more. As a member of the Council of Europe Russia has militarily invaded its co-Council member Ukraine in February 2022. Although Russia's membership of the CoE has been terminated as a result of its flagrant violation of the territorial integrity of a sovereign state,²³ the escalation of the conflict into a full-scale war shows in the most brutal way that the foundation of an association of sovereign states is not a watertight assurance against war. From the perspective of the present essay, this conclusion warrants a re-evaluation of the transformation of Europe and an analysis of the stages along which the metamorphosis from a union of states on a devastated continent to a regional democracy of states and citizens has taken place.²⁴

1) Driven by the determination to create an ever closer union among the peoples of Europe the Founding Fathers of the EU have broken the circle of warfare on the old Continent. The aim of the 1951 European Community of Steel and Coal was in the words of Robert Schuman 'to make war not only theoretically unthinkable but also materially impossible'.²⁵ The conceptual innovation required to achieve this goal consisted of the pooling of sovereignty. So, the first step away from the Westphalian system was taken very deliberately indeed.²⁶ The participating states sacrificed the principle of absolute sovereignty for the guarantee of peace.²⁷

2) Given the immediate success of the practice of shared exercise of sovereignty the six founding states of the present EU decided to broaden their cooperation to the entire economy. The European Economic Community and Euratom, both founded by virtue of the 1957 Treaty of Rome, merged with the ECSC in 1965. As a result, the executive institutions of the three separate communities were unified.²⁸ The EC Court of Justice established in 1963 that the transfer of sovereignty to the EEC had led to the emergence of an 'autonomous legal order'.²⁹ Consequently, the Court added a juridical dimension to the original step of departing from the Westphalian system. The ECJ also clarified that the

law of the Communities has direct effect and, in case of conflict, takes precedence over national regulations.³⁰

3) The internal market, which the member states intended to create for boosting their economies, envisaged a gradual transition from unanimous decision making to a practice of deciding by majority voting. However, the French President de Gaulle insisted on the preservation of the right of veto and blocked his country's participation in the Communities until further notice. As his 'policy of the empty chair' was driven by the explicit wish to return to the Westphalian concept of unrestricted sovereignty, it resulted in the first existential crisis of the European polity. The political blockade was only overcome through the ingenious 1966 compromise of Luxembourg.³¹

4) Despite this temporary setback the emerging common market proved to be so attractive that new member states asked for accession. After the first enlargement in 1973 the European Council described the then Communities at the Summit of Copenhagen as 'a union of democratic states'.³² In hindsight, the identification of the emerging polity as a union of democratic states is openly contradicting the very principles of the Westphalian system, which accentuate that the constitutional concepts of democracy and the rule of law can only come to fruition within the boundaries of a sovereign state.

5) Contrary to the Westphalian postulate that it is impossible for an international organisation to be governed in a democratic way, the democratic principle requires that a union of democratic states must also be democratically governed. From the civilian perspective, it is contradictory for a union of democratic states to be ruled in an authoritarian, let alone dictatorial way. In line with this approach, the European Council wanted to give the emerging polity also democratic legitimacy of its own. It transformed the parliamentary assembly into a directly elected parliament and called for the first direct elections for the European Parliament in 1979. The voters participated in these elections not as 'citizens of the Communities' but rather in their capacity of 'subjects of the Member States brought together in the Communities'. Although those 'subjects', who had taken up lawful residence in another member state, were entitled to vote at the EP-elections in that other member state, voters

could not cast their ballot on a candidate from another member state. In fact, EU citizens who participated in the 2019 election for the European Parliament were still bound by the practice of national lists with national candidates.³³ Despite these imperfections, the creation of a directly elected parliament constituted the first breakaway from the traditional template of democracy.

6) As the turnout for the second direct EP-elections witnessed a decrease in voter participation, the European Council tasked the Adonnino Committee to present suggestions for bridging the gap between the citizens and their Communities. While the Committee addressed the citizens in their capacity of 'nationals of the Member States gathered in the Communities', its proposals included the introduction of the EU flag and the foundation of the Erasmus Exchange program.³⁴

7) Although severe economic recession in the seventies and eighties caused a feeling of 'eurosclerosis' in the member states, the Communities welcomed three new countries from Southern Europe after they had shaken off the yoke of fascism. The increase in the number of participants and the determination to complete the internal market prompted the Communities to introduce quality majority voting (QMV) through the Single European Act of 1987.³⁵ While this decision may be justified for reasons of effective decision-making, it implies a serious rupture with the Westphalian principle that the sovereign participants in a union of states enjoy the right to veto and cannot be bound against their will.³⁶ The -limited- abolition of the veto fitted in the efforts of the Communities to prepare themselves for 'Europe 1992'. By associating the emerging polity with an 'Unidentified Political Object', the President of the European Commission Jacques Delors indicated his awareness of the uncertainty the leap forward would entail.

8) The Fall of the Berlin Wall in 1989 and the implosion of the Soviet-dominated Warsaw Pact preceded but did not prevent the foundation of the European Union through the 1992 Treaty of Maastricht. Instead, the regions which used to form the German Democratic Republic became an integral part of the EU.³⁷ The principle aim of 'Maastricht' was to complete the internal market. Both the introduction of EU citizenship and the creation of the single currency were regarded as the crown jewels of the internal market. In line with this utilitarian

approach, the European Council wanted to encourage the free movement of the nationals of the member states by strengthening their legal status in their countries of residence. Although the Council did not envisage major conceptual innovations, it decided to introduce a citizenship of the Union. Obviously, the workers for which EU citizenship was meant, already enjoyed the right of free movement and the new status did not much to improve their situation.³⁸ However, once EU citizenship had been introduced, it acquired a meaning of its own, paradoxically through the rejection of the Treaty of Maastricht by the Danish electorate in 1992.³⁹ Whatever the vicissitudes of the new status, the introduction of EU citizenship implied a definitive schism with the Westphalian system inasmuch as international organisations can only consist of states, not of citizens.

9) As a matter of principle the EU is open to all democratic states of Europe. After the Fall of the Wall, a considerable number of applicant countries signalled their intention to join the Union. In reaction, the 1993 Copenhagen Summit clarified the criteria for accession to the EU by new member states.⁴⁰ These criteria emphasized the need to respect the values of the EU, notably democracy and the rule of law. An unforeseen consequence of the accentuation of the values was that the aspirant-members had to meet more stringent constitutional criteria than the sitting members of the Union. With a witty reference to the aphorism of the Marx Brothers that they did not want to join a club, which would accept persons like them as its members, observers consequently criticised the European Union for failing to meet the criteria for accession to the Union! The 1997 Treaty of Amsterdam redressed this anomaly by including the values of the European Union in the treaties. In philosophical terms, 'Amsterdam' substitutes the Aristotelian concept of men as political beings for the utilitarian approach of the citizens as 'marketmen'. As these values apply both to the member states and the Union proper, the Amsterdam Treaty initiated the transformation of the EU into a dual democracy, into a system of democracy in Europe and democracy of Europe.⁴¹ In doing so, it superseded the sacrosanct principle of the Westphalian system that constitutions belong to the semantic field of sovereign states and that they are incompatible with the very concept of international organisations.

10) The construction of a democracy at the level of the Union received a decisive impetus from the proclamation of the Charter of Fundamental Rights of the EU at the Summit of Nice in 2000. Eight years after the introduction of EU citizenship the new status still remained an empty vessel. The citizens of the Union did not enjoy more rights than those already attributed to them by virtue of the fundamental freedoms of the internal market. The Charter brought about a fundamental change and granted the new citizens a full political, economic, social and legal status. It was, in effect, the Magna Charta of the citizens and enabled them to confidently declare: 'Civis Europaeus sum'.⁴² From a conceptual point of view, the Charter further widened the gap between the Westphalian system and the emerging European democracy of states and citizens.⁴³

11) Although the rejection in 2005 of the Constitution for Europe by the electorates of two founding member states was widely regarded as a serious setback, the ensuing impasse was quickly overcome through the Treaty of Lisbon in 2007. The unique and unprecedented hallmark of the Lisbon Treaty is that it construes the EU as a democracy without turning the Union into a State. From the civilian perspective, 'Lisbon' resumes the road towards dual democracy embarked upon ten years before in Amsterdam. Thanks to the Lisbon Treaty citizens are entitled to perceive the EU as a union of democratic states, which also constitutes a democracy of its own. Consequently, the Lisbon Treaty allows for the European Union as dual democracy or, alternatively, as 'democracy of democracies' or as 'a democratic union of democratic states'.⁴⁴

12) In the monetary and financial domain, the Westphalian paradigm demands that currencies must be supported by states. States have 'deep pockets'. National governments are able to raise taxes, to issue loans and to take on debts. Consequently, debts of states are referred to by the financial markets as 'sovereign debts'. As neither the EU nor the EMU pretends to be a state, monetary pundits and financial markets reacted rather suspiciously to the announcement of the government leaders in Maastricht that they intended to crown the internal market with a single currency. Although its introduction was planned and prepared over a period of ten years, the markets were keen to prove at their earliest opportunity that the euro was no more than *a currency without a state*. While the rating agencies

started to downgrade the financial credibility of the EMU member states, the hedge funds plotted to capitalise on the collapse of the euro. Amidst growing uncertainty the German Chancellor Merkel stated in the Bundestag that, if the euro would fall, the EU would disintegrate too. As a result of the British unwillingness to provide political support for the single currency, the members of the European Council had to take recourse to the conclusion of an intergovernmental agreement outside the framework of the EU in order to save the euro. It was only after the Council's decision of June 2012 to establish a banking union and to entrust the European Central Bank with the task to supervise more than 120 banks in the euro area that the President of the ECB felt sufficiently empowered to convince the markets that his bank would do 'whatever it takes' to preserve the single currency. After his intervention the markets calmed down and the euro established itself in a post-Westphalian manner as a *currency beyond the state*. Ten years onward, the euro is an indispensable asset for the EU as a regional democracy of states and citizens.

13) The consequences of the Lisbon Treaty proved to be far greater than politicians had foreseen. The ECJ had already established before the entry into force of the new treaty on 1 December 2009 that the new status was to be regarded as the fundamental status of the nationals of the member states.⁴⁵ In consequence, it abolished the requirement for EU citizens to cross a border in order to 'activate' their rights as citizens of the Union.⁴⁶ It ruled in subsequent verdicts that EU citizens can also invoke their rights against the authorities of the own country, even if they have been convicted to imprisonment for breaches of national laws!⁴⁷ In the high profile-case of a jailed politician, who had been elected in 2019 as a Member of the European Parliament, the ECJ established that the EU has an autonomous democracy.⁴⁸ Thus, the case law of the ECJ warrants the conclusion that, acting within the limits of its competences, the EU has to meet similar requirements of democracy and the rule of law as it demands its member states to respect.

14) The internal developments within the polity are reflected in the Foreign Affairs of the Union. The common market has not only been crowned with the single currency but article 3 of the Treaty on European Union also gives the Union exclusive competence in the field of International Trade. At the same time the Lisbon Treaty has upgraded the

role and stature of the High Representative of the Union for Foreign Affairs and Security Policy, while it also tasked the President of the European Council with the external representation of the Union at his level. Since 2011 the European External Action Service (EEAS) ensures the EU's diplomatic representation abroad.

The evolution of the EU to a regional democracy of states and citizens has been acknowledged by the United Nations. According to Resolution 65/267 of 3 May 2011 the EU enjoys the status of 'enhanced observer' within the UN system. Although the UN continues to be based on the premises of the Westphalian system and the EU is consequently a rare bird (*ava raris*), the European Union may be qualified in terms of the UN system of global governance as the first-ever democratic international organisation. From the UN perspective the EU has evolved from a more or less regular regional organisation to a unique and unprecedented regional democracy of states and citizens.⁴⁹ This development has been confirmed independently by the United States president Joe Biden through his invitation to the EU to participate as the only international organisation in the 2021-2022 Summits for Democracy.⁵⁰ The active contribution of the EU to the Summits symbolises the unforeseen transformation of the European polity from an association of states to a regional democracy of states and citizens. Although the existence of the EU as a union of states and citizens contradicts the Westphalian principle that constitutional values and international organisations are incompatible, the Union proves in practice that it is possible for international organisations to function on a democratic footing. The decision of one member state to prevent the EU from speaking on behalf of all its members on this occasion demonstrated that the evolution from a union of states to a regional democracy of states and citizens has not yet been completed.⁵¹

The European Model of Transnational Governance

Although the EU has reached its constitutional destination and can now be described as a regional democracy of states and citizens, the original aim to 'lay the foundations for an ever closer union among the peoples of Europe' has neither lost its potential nor its dynamics. Two subsequent Commissions (Juncker and Von der Leyen) have turned the democratisation of the EU into a policy priority.⁵² In a reaction to the democratic back-

lash, which hit the continent and the world at large in the second decade of the 21st century,⁵³ the Commission launched the yearly Rule of Law Report in 2020, which assesses the situation in the 27 member states of the EU with respect to the rule of law, the justice system, the anti-corruption framework and media pluralism.⁵⁴ While the Commission also introduced a European Democracy Action Plan (EDAP) in the same year, three EU institutions (the Parliament, the Council and the Commission) organised and contributed to a major consultation of the citizens of the EU.⁵⁵ Seen in this perspective, the CM verdicts of the ECJ have not come as a surprise or as a paragon of judicial activism. Instead these verdicts may be perceived as the unavoidable confirmation of the new model of governance beyond the Westphalian system, which has been gradually transforming Europe over the decades. The characteristics of the traditional Westphalian system and the emerging European Model of Transnational Governance may now be contrasted as follows:

	Westphalian system	European model
Sovereignty	Absolute	Shared
War	Not excluded	Impossible
Borders & Customs	National	External
Market	National	Internal
Citizenship	National	Dual
Currency	National	Single
Democracy	National	Dual
Internal Affairs	Non-interference	Rule of Law
Global stage	Irrelevant	Major player

The chart confirms that the initial deviation from the Westphalian system, which consisted of the ‘revolutionary’ decision by six states to share the exercise of sovereignty in order to ensure lasting peace, has caused a series of further divergences from the traditional system, which goes much further than the academic compromise to describe the EC/EU as an organisation *sui generis* suggested.⁵⁶ Taken together, they form a new model of governance, which underlies the functioning of the EU in its present form. Whereas the functioning of the United Nations is informed by the Westphalian system of International Relations, the working of the European Union is based upon the European Model of Transnational Governance. While both models are constantly required to react to emerging challenges, the European Model has not yet reached the level of maturity which the Westphalian system has obtained over the centuries.⁵⁷ Its presence, however, is

real. It underpins the democratic foundations of the European Union and warrants the identification of the EU as a new subject of international law, which can be described from the UN-perspective of global governance as a democratic regional organisation, while it may be regarded from the internal viewpoint of citizens as a democratic Union of democratic States. Obviously, the conceptual problem which the EU must learn to handle is that, while its internal functioning is informed by the European model of Transnational Governance, it has to face the grim realities of the Westphalian system in its foreign affairs!

THE THEORY OF DEMOCRATIC INTEGRATION

The metamorphosis of Europe can be summarised in the aphorism that the desire to break the seemingly endless circle of war has resulted in the creation of a new kind of international organisation with an innovative model of governance. In the process, the EU has replaced the Westphalian system with its own European model of transnational governance in a similar way as the latter/former had substituted its paradigm of absolute sovereignty for the diffuse sovereignty of the Middle Ages.

Schematically:		
Middle Ages	feudal system	diffuse sovereignty
Modern Era	Westphalian system	absolute sovereignty
Present Times	multilateral approach	shared sovereignty

These developments are so fundamental and far-reaching that they have gone unnoticed so far. Seven decades after the foundation of the ECSC in 1952 the EU has to come to terms with its own originality. Until today, the EU is presenting itself in its printed and digital publications as a ‘unique economic and political union between 27 European countries’.⁵⁸ This portrayal of the EU as a mere union of states does not account for the Union’s internal market, not for its autonomous legal order, not for its directly elected Parliament, not for its citizens, not for its single currency and, ultimately, not for its common values. If the EU wants to encourage its citizens to participate in the political life of the Union, as article 10, para 3, TEU stipulates, it should supplant this outdated description with a more contemporary and confident self-presentation like: *The EU is a union of states and citizens which works as a European democracy.*

In the theoretical domain, some hard nuts must

be cracked too. It is an academic *testimonium pauper-tatis* to suggest that it should be impossible for the EU to be defined. The fact that the EU cannot be forged into either of the two Westphalian categories of state and organisation of states does not mean that the Union cannot be identified at all.

In addition, theorists should not be frightened to abandon prevailing paradigms once they have lost the capability of explaining reality. As the EU is not only composed of states but also of citizens, the Westphalian paradigm of states can no longer account for its functioning. Moreover, it is at odds with the perception of the citizens. Citizens of democratic states regard it as self-evident that, if their country decides to share the exercise of sovereignty in ever wider fields with other democratic states, their common organisation should be democratic too. Indeed, young citizens have already drawn the unavoidable conclusion of the democratisation of the EU by founding the first pan-European political party.⁵⁹ In other words, the Westphalian paradigm of states and diplomats has to be replaced with the civic perspective of democracy and the rule of law. The above survey of the stages along which the EU has evolved, shows that the Union has indeed developed from a Union of democratic States (Copenhagen 1973) to a union of democratic states that also constitutes a democracy of its own. In the CM verdicts, the ECJ has qualified this evolution in legal terms by explicating that the member states have first agreed on their common constitutional values and subsequently applied these values to their Union. This paradigm change provides a solid basis for the theory of democratic integration, which may serve as an explanatory model for the functioning of the EU as a regional democracy of states and citizens.⁶⁰ In the field of foreign affairs, the new theory unveils that national vetoes are incompatible with transnational democracy. While the Hungarian parliament is drawing its particular consequence of this anomaly by proposing to deconstruct European democracy and to downgrade the European Parliament to a parliamentary assembly, the EU should abolish the national veto in foreign affairs at its earliest opportunity.

EXPLORING THE TERRA INCOGNITA

Although the European Commission attaches great importance to fundamental research and innovation,⁶¹ the jurisprudence of the ECJ concerning the democratic identity of the EU as a post-Westphalian polity has taken the academic community by surprise. The present

article may even form the first communication to this effect. Yet, the EU's leap forward into the *terra incognita* of a post-Westphalian order is revolutionary and its consequences are far-reaching. Obviously, the first step to be taken is to chart the *terra incognita* and to bring researchers from various disciplines together with the task to 'imagine the unimaginable'. The interdisciplinary team should at least include constitutional and international lawyers, political scientists, federal thinkers, scholars in the fields of International Relations, Democratic Theory and Global Governance as well as economists, financial experts, tax specialists, historians and last but not least philosophers. Since the ECJ has already established that the EU has superseded the Westphalian system as guiding paradigm for its internal functioning, academic action should be taken without delay!

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- ¹⁶ *Supra* note 1

¹⁷ Augsburg Allgemeine, 21 October 2021

¹⁸ Proper legal analysis has been provided by EULawLive in a Special Issue on: The Court of Justice's Judgements on the Rule-of-Law Financial Conditionality Regulation, EULawLive 2022, nr 91, with contributions by Pekka Pohjankoski and Niels Kirst. A thorough study in Dutch was published by M. Chamon, De conditionaliteitsverordening: een (beperkte) uitbreiding van het rechtsstaatsarsenaal van de EU, SEW 2022-7/8

¹⁹ Whereas the Westphalian system forms the cornerstone of the study of International Relations, it is hardly known by scholars and practitioners outside the domain. The present author has been fortunate enough to benefit from the wisdom of B. Tromp, Het ontstaan en de geschiedenis van het statenstelsel, in J. Melissen (red), Europese diplomatie. In de schaduw van Westfalen, Assen 2000

²⁰ A. Bick, Westphalia beyond the Myth, JSTOR, <http://www.jstor.org/stable/resrep26045.4>. Accessed 29 June 2022

²¹ I. Kant, Zum ewigen Frieden, Königsbergen 1796

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²³ R. A. Lawson, They can destroy our houses. But they cannot destroy our values. www.leidenlawblog.nl, 17 March 2022

²⁴ In the field of Global Governance and IR the term 'regional democracy of states and citizens' is unambiguous. Student from other disciplines may wish to describe the EU as a transnational or European democracy of states and citizens

²⁵ Déclaration de Schuman, 9 Mai 1950, <http://www.centre-robert-schuman.org>

²⁶ The construction of the 1952 ECSC has been described as 'a revolutionary breakthrough from the classic pattern of international organisation' by P.J.G Kapteyn in Kapteyn & Verloren van Themaat, The Law of the European Union and the European Communities, 4th ed, Alphen aan den Rijn, 2008

²⁷ A method not foreseen by Immanuel Kant, supra note 21

²⁸ Treaty of Brussels of 8 April 1965, known as the Merger Treaty

²⁹ Case Van Gend en Loos, ECLI:EU:C:1963:2

³⁰ Case Costa v E.N.E.L., ECLI:EU:C:1964:66

³¹ H. Vos, Dit is Europa, Gent 2021

³² Declaration on European Identity, EC-Bulletin 1973-12

³³ The underlying problem is that the electoral system must account for the transition of the eligible voters from 'nationals of the member states, brought together in the Communities' to EU citizens. The latest attempt by the European Parliament consists of the Ruiz Devesa-proposal to introduce transnational lists at the 2024 elections for the European Parliament. Ref 20220422STO27706

³⁴ H. Brugmans (ed), Europe: Dream—Adventure—Reality, Brussels 1987

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⁴⁰ At present codified in article 49 TEU

⁴¹ Report on European Democracy, High Level Group of the Committee of the Regions, Brussels 2022

⁴² K. Lenaerts, Civis Europaeus Sum, in: Constitutionalising the EU Judicial System, Cardonnel, Rosas & Wahl, Oxford 2012

⁴³ Compare: W. van Gerven, The European Union: a polity of states and peoples, Stanford 2006

⁴⁴ J. Hoeksma, The European Union: a democratic union of democratic states, Oisterwijk 2021

⁴⁵ Case Grzelczyk, ECLI:EU:C:2001:458

⁴⁶ Case Ruiz Zambrano, ECLI:EU:C:2011:124

⁴⁷ Case Delvigny, ECLI:EU:C:2015:648

⁴⁸ Case Junqueras Vies, ECLI:EU:C:2019:1115

⁴⁹ B. Laffan, Europe in the world: The emergence of Collective Power Europe? Asser Lecture, The Hague 2022, prefers to describe the EU in its current form as 'collective power Europe'.

⁵⁰ <https://www.state.gov/summit-for-democracy/>

⁵¹ Euractiv, 3 December 2021, Hungary: US has bigger problems with democracy, blocks EU position at summit

⁵² Commission Juncker (2014-2019), 10th priority, Commission Von der Leyen (2019-2024), 6th priority