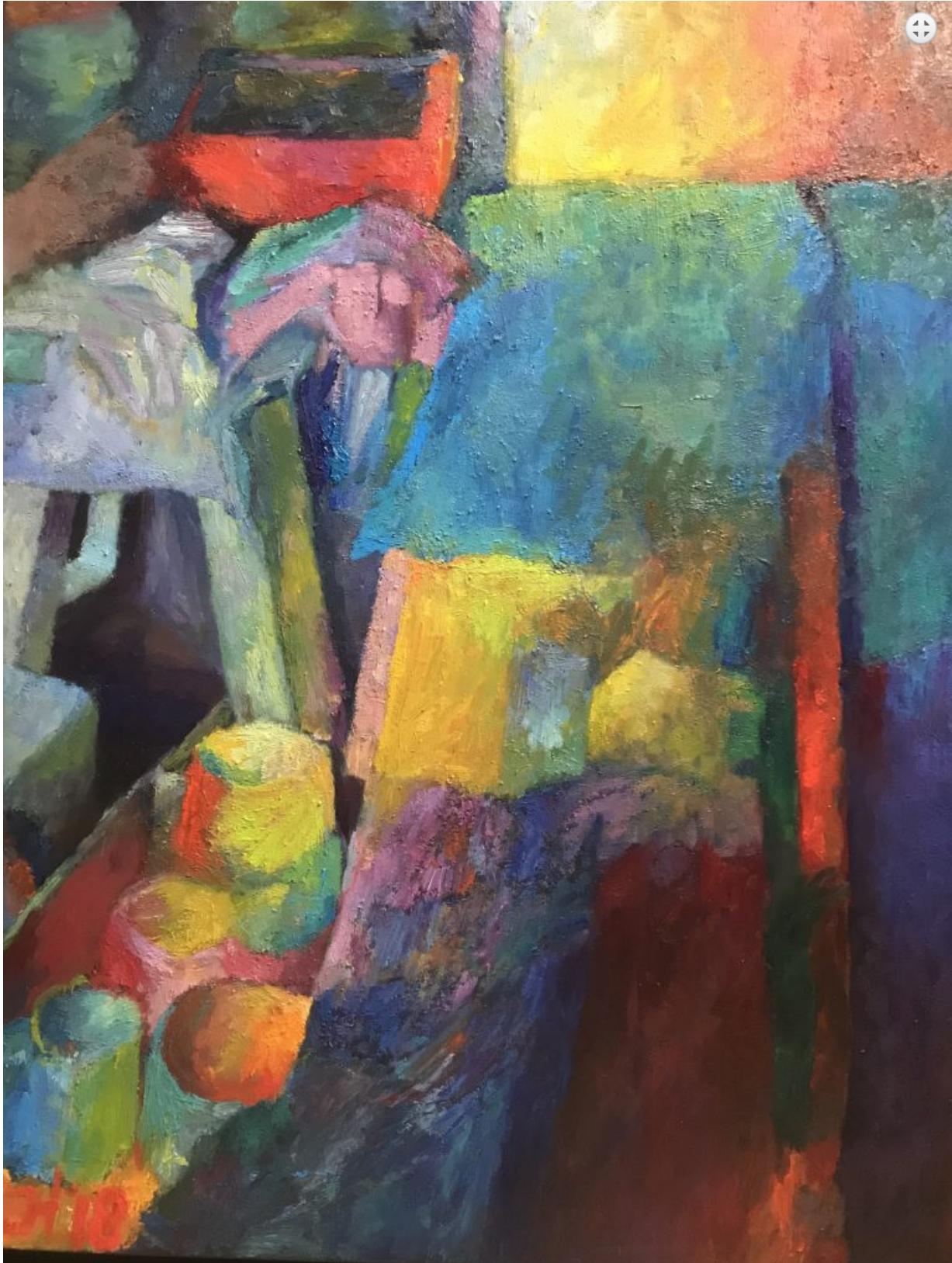


**April 27, 2024** by



**April 27, 2024** by

*Jaap Hoeksma (1948) studied philosophy of law at the Free University of Amsterdam. He worked with the Office of the High Commissioner of the United Nations for Refugees and published on asylum and refugee law. In 1992 he focussed his attention on the newly established European Union, turned the EU into a board game about European democracy and developed the theory of democratic integration as an explanatory model for the functioning of the EU as a European democracy.*

The name of the Dutch historian Johan Huizinga (1872-1945) does not figure prominently among the intellectual protagonists of European democracy. As a conservative by heart, he appreciated the value of national states and cultures. In his capacity of rector magnificus of the Leyden University he ordered a delegation from Nazi-Germany in 1933 to leave an academic meeting.[1] He actively participated in the transnational interbellum debate about the future of Europe and warned in an almost prophetic way against the impending dangers for European civilisation. After the invasion of The Netherlands by Hitler-Germany he was taken as a hostage to the hostage camp of St Michielsgestel and subsequently condemned to internal exile in the hamlet of De Steeg. Huizinga did not live to see the liberation of his country, but his legacy contained the blueprint for the construction of a post war-Europe, which was published after his death in 1945.[2]

### **Curbing absolute sovereignty**

The political will of the historian Huizinga contains a striking similarity with the Manifest, that was written eighty years ago in the Italian internment camp of Ventotene by Altiero Spinelli and Ernesto Rossi. The aged Dutch conservative and the young Italian communists agreed on the maxim that absolute sovereignty destroys absolutely. The conclusion, which the authors of the Ventotene Manifesto drew from this unsustainable state of affairs, was that the division of Europe in national sovereign states had to be abolished. They envisaged the

**April 27, 2024** by

creation of a 'solid international state'. As a cultural philosopher Huizinga displayed a somewhat more cautious approach. He argued that the peacemakers of 1919 had missed a historic opportunity to secure a stable world order. 'When they had the chance to renew the system of global governance, they failed to see that the concept of absolute sovereignty had become obsolete.' As a result, the peace of Versailles had sown the seeds for politics of revenge, aggression and, ultimately, a second world war. Looking ahead in the final chapter, Huizinga suggested that permanent peace should be achieved through law. In his view, the only way for the small states of Europe to obtain safety and security was through integration in a new legal order with the larger ones. So, while the authors of the Ventotene Manifesto wanted to address the problem of absolute sovereignty by abolishing the sovereign states altogether, Huizinga preferred to reign in the sovereignty of those states by the creation of an overarching legal order in post-war Europe.

### **The Kantian dilemma of statehood and international law**

The differences of view between these authors concerning the strategy to curb absolute sovereignty illustrates the Kantian dilemma of statehood and international law. The German philosopher Immanuel Kant (1724-1804) was the first scholar to investigate the possibilities for states to create a situation of lasting peace. On the eve of the Napoleonic wars he suggested in his essay '*Zum Ewigen Frieden*', which was forbidden by the Nazi's in the Third Reich, that states wishing to attain perpetual peace could either merge into a federal state or agree to form a federation of free states.[3] In the first option, sovereignty would be transferred by the participating states to their common creation; in the second option sovereignty would remain with the states involved. As they would be guided by their shared desire for peace, war would no longer be justified as a last resort, but rejected as morally condemnable.

In his essay, which contained a severe *critique* on the Western norms and

**April 27, 2024** by

civilisation of his time, Kant explored the limits of the so-called Westphalian system of International Relations. The Westphalian system emerged in the aftermath of the Middle Ages as a code of conduct between modern states. Its name stems from the German region of Westphalia, which formed the scene of comprehensive peace negotiations in the 17<sup>th</sup> century. Ambassadors from almost all European states and the Holy See had gathered in the cities of Münster and Osnabrück with a view to bring an end to both the devastating Thirty Years' War in Germany and the Eighty Years' War between Spain and The Netherlands. The outcome of their deliberations, which were informed by the works of Grotius (1583-1645), constituted the basis for modern international law. In this system, war is the ultimate means of the resolution of conflicts between states. It may not be conducted at whim but requires both a formal declaration and a serious cause (*casus belli*).

At present, the Westphalian paradigm underlies the functioning of the Organisation of the United Nations, in which regional organisations of states are playing a more significant role than in previous times, notably with respect to the maintenance of peace. Two centuries after Kant, the dichotomy between sovereign states and organisations of free states has only sharpened. Seen in this perspective, the differences of view between Spinelli and Huizinga accentuate the Kantian dilemma of statehood and international law. Spinelli chose the federal option by transferring the sovereignty from the belligerent states to the new one, whereas Huizinga preferred to curb the absolute sovereignty of the European states through the voluntary creation of a new legal order. For theorists and politicians of the day, other options were not available. *Tertium non datur!***[4]**

### **The Conference on the Future of Europe**

The Westphalian paradigm proved to be so dominant that it has seriously hampered the evolution of the EU. Generations of students in Europe and abroad have been educated with the idea that its predecessors and the EU were an

**April 27, 2024** by

organisation sui generis, that could neither be identified nor categorised. The late Michael Burgess even coined the phrase that the EU works in practice, although it cannot function in theory.[5] Seventy years after the start of the process of European integration the Conference on the Future of Europe offers an excellent opportunity to come to terms with the own and distinct character of the European Union. The challenge for the participants is to demonstrate that the EU can work in theory and to improve its functioning in practice.

One of the greatest mistakes the participants in and stakeholders to the Conference could make would be to take the concept of EU democracy for granted. Quite some commentators and activists argue that democracy is under threat in various parts of the world, that the USA has narrowly escaped a coup d'état, that the military have staged a successful takeover in Myanmar, that several Middle-European EU member states are flouting the rule of law and that democracy in the EU itself is also under serious threat. Such an approach would give rise to major conceptual mistakes. It notably overlooks the fact that the EU is still a young and consequently imperfect democracy. In fact, the EU is giving the democratic idea a major boost by establishing itself as the first-ever transnational democracy in the world! In the process it has to overcome considerable hurdles. The most recent obstacles are Brexit and the EZB-Urteil of the German Constitutional Court.[6] In his notorious Bloomberg-speech of January 2013, in which he announced his decision to organise a referendum about British membership of the European Union, David Cameron criticized the EU as undemocratic organisation since only the member states could be democratic. It followed in his logic that the EU should return to Westphalia and reform itself into a traditional organisation of states. In a similar vein, the German Constitutional Court has developed the view in a series of subsequent verdicts that EU citizenship is not a 'real' status, that the European Parliament is not a 'real' parliament and that it is also impossible for the EU Court of Justice to be regarded and respected as a judge of last resort. The EU needs to make a considerable theoretical effort to counter this kind of criticism, if it wants to

**April 27, 2024** by

establish and present itself as a European democracy. It is therefore most timely and appropriate that the signatories of the Joint Declaration on the Conference on the Future of Europa have expressed their determination 'to seize the opportunity to underpin the democratic legitimacy and functioning of the European project'. The purpose of the present essay is to respond to the call of the presidents of the European Parliament, the Council and the Commission by

- a. identifying the EU as a new subject of international law,
- b. presenting an own and distinct political philosophy for the EU and
- c. demonstrating that the EU has replaced the Westphalian system of International Relations with an own model of governance, which will be introduced as the European Model of Transnational Governance.

The conclusion, which will be drawn towards to end of the essay, is that the combined endeavour of Spinelli and Huizinga to curb the absolute sovereignty of states in Europe has resulted in the emergence of the EU as a new subject of international law (a democratic regional organisation) with an innovative system of governance (the European Model of Transnational Governance).

### **From union of democratic states.....**

Looking through the lens of Spinelli, Huizinga and all the others who wanted *Nie Wieder Krieg*, the evolution of the European experiment may be described as a deviation of the Westphalian paradigm.[7] In contrast to the Council of Europe, which was established in 1949 with a view to promote human rights and democracy all over Europe, the six founding members of the present EU (France, the FRG, Italy and the Benelux-countries) agreed to make the renewed outbreak of war between them not only unthinkable, but also virtually impossible. The means through which they intended to achieve this goal consisted of the sharing of sovereignty. In order to ensure the prevention of mutual war, the participating states transferred their sovereignty in the fields of coal and steel to a higher authority. Although this decision implied a revolutionary rupture with the

**April 27, 2024** by

Westphalian system, the member states of the 1952 ECSC learned in practice that the sharing of sovereignty in a limited field was a reasonable price to pay for peace.

Encouraged by the success of their experiment the six decided to proceed on their path towards a new model of transnational relations by extending the practice of shared sovereignty to the whole of the economy. In 1957 they established the EEC with a view to further the prosperity of their nations and citizens. They expressed their determination to lay the foundations for an ever closer union among the peoples of Europe and aimed to create an internal market. The Court of Justice of the Communities found in 1963 that the member states had indeed created a new and autonomous legal order between themselves and ruled a year later that the law of the Communities has direct effect and – in case of conflict- precedes national rules and regulations.[8] Taking stock of the turbulent developments the newly founded European Council described the Communities after the first enlargement in 1973 as a ‘Union of democratic States’.[9]

### **...to democratic regional organisation**

From a conceptual point of view the Communities formed a more or less regular regional organisation, albeit that the member states had to comply with certain democratic criteria and the organisation possessed an autonomous legal order. In hindsight, however, the qualification of the Communities as a ‘Union of democratic States’ implied the start of a paradigm clash inasmuch as the Westphalian system holds that organisations of states cannot be democratic, whereas the democratic principle suggests that there is no point in governing an organisation of democratic states in an undemocratic manner. In line with their aspiration to create an ever closer union among the peoples of Europe, the members of the European Council decided to give their organisation democratic legitimacy too. Consequently, the first direct elections for the European



**April 27, 2024** by

Parliament were held in the spring of 1979. For the first time, the citizens of the member states were entitled to elect candidates from their country as Members of the European Parliament!

The subsequent evolution of the EU can no longer be explained by theories embedded in the Westphalian system. The theory of democratic integration offers a fresh perspective by suggesting that, if two or more 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. From the viewpoint, the decision of the European Council to establish a citizenship of the Union was of fundamental importance.[10] Although the Council envisaged to complete the internal market, the introduction of EU citizenship by virtue of the Maastricht Treaty laid the foundation for the emergence of a European democracy. After the Danish voters had made clear during their first referendum about the Treaty on European Union (TEU) that they did not want to give up their national status in favour of EU citizenship, the Council emphasized that EU citizenship is an additional status, which does not replace the national status of the citizens involved (art 9 TEU).

The 1997 Amsterdam Treaty formed another step away from the Westphalian system towards an alternative model of governance. It included 'democracy' in the core values of the Union proper and introduced a procedure to guarantee the respect for the EU's values by the member states (art 7 TEU). In doing so, 'Amsterdam' accentuated the concept of dual democracy, which has become a hallmark of the Union. Meanwhile, the member states participating in the Economic and Monetary Union were preparing the introduction of the euro as single currency of the Union. This implied a major deviation from 'Westphalia' too as unions of states are not supposed to administer and support their own coins. The 2000 summit of Nice saw the proclamation of the Charter of Fundamental Rights of the Union, which was hailed as the 'Magna Charta' of the newly created citizens of the Union. It was integrated in the treaties through the 2007 Treaty of



**April 27, 2024** by

Lisbon, which came to replace the ill-fated Constitution for Europe after its rejection by the French and the Dutch electorates in the spring of 2005.

The novelty of the Lisbon Treaty is that it construes the EU as a democracy without turning the Union into a State. Title II TEU contains the democratic principles of the EU and underlines that ‘citizens are directly represented at Union level by the European Parliament’ (art 10, para 2, TEU).[11] The far-reaching consequences of the new construction were illuminated through the case law of the ECJ, notably with respect to the status of EU citizens, who are now entitled to say ‘Civis Europaeus sum’.[12] Moreover, the ECJ established in two recent verdicts that the EU has an ‘autonomous democracy’.[13] On the eve of the Conference on the Future of Europe it may therefore be concluded that the EU has evolved to a Union of democratic States, which also constitutes a democracy of its own. As a ‘democratic Union of democratic States’ the EU forms neither a state nor a union of states. Instead, it may be identified with a new term as a democratic regional organisation.[14]

### **The European Model of Transnational Governance**

Although the EU has reached its constitutional destination as a democratic Union of democratic states, its evolution towards an ever closer union continues. The introduction of a rule of law mechanism in the granting of EU subsidies to individual member states may be regarded as the ultimate confirmation of the new model of governance beyond the Westphalian system, which has transformed Europe over the decades. The characteristics of the traditional Westphalian system and the emerging European Model of Transnational Governance may be contrasted as follows:

		<b>Westphalian</b>
<b>system</b>	<b>European model</b>	
Sovereignty	Absolute	Shared

**April 27, 2024** by

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
Mech		
Global stage	irrelevant	major
player		

### **Messages of hope**

The transformation of Europe from a war-torn continent to a democratic regional organisation may contain two messages of hope for the global community. On the long run, the introduction of EU citizenship may inspire the United Nations to create a UN citizenship. In a comparable way as EU citizenship had laid the basis for a European democracy, the citizenship of the United Nations may result in the emergence of a system of democratic governance at the global level. In a more immediate future the evolution of the EU into a democratic regional organisation may serve as a symbol of confidence for other unions of states with democratic aspirations. Obviously, each continent has to follow its own path, but the emergence of transnational democracies in other parts of the world will not only contribute to the realisation of the goals of the United Nations, but also to an improvement of the present system of global governance.[15]

**April 27, 2024** by

- 
- [1] A. van der Lem, Johan Huizinga, Leven en werk in beelden & documenten, Amsterdam 1993
- [2] J. Huizinga, Geschonden Wereld, Haarlem 1945
- [3] I. Kant, Zum Ewigen Frieden, Königsbergen 1796
- [4] P. Magnette, What is the European Union?, London 2005
- [5] M. Burgess, Comparative Federalism, Theory and Practice, London 2006
- [6] J. Hoeksma, The Case BundesVerfassungsGericht versus EU Court of Justice, Oisterwijk 2020
- [7] W. van Gerven, The European Union: a polity of states and peoples, Stanford 2005
- [8] Cases Van Gend en Loos, ECLI:EU:C:1963:1 and Costa vs E.N.E.L., ECLI:EU:C:1964:66
- [9] Declaration on European Identity, Copenhagen 1973, EC Bulletin 12-1973
- [10] J. Hoeksma, The Theory of Democratic Integration, Oisterwijk 2018
- [11] From the conceptual viewpoint, it should also be noted that the treaty gave the EU legal personality!
- [12] K. Lenaerts, 'Civis Europaeus Sum', from the Cross-border link to the Status of Citizen of the Union, in: Constitutionalising the EU judicial system, Cardonnel, Rosas & Wahl, Oxford 2012
- [13] Cases Puppinck and others, ECLI:EU:C:2019:1113 and Junqueras Vies, ECLI:EU:C:2019:1115

**April 27, 2024** by

[14] J. Hoeksma, *European Democracy*, Tilburg 2019

[15] M. Teló (ed), *Reforming Multilateralism in Post-Covid Times*, Brussels 2020