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EUROPEAN CONSTITUTION – DILEMMA’S AND PERSPECTIVES

Summary

Generally, in Europe exists a number of academic and legal opinions that claims that European Union already has a constitution. Actually, it is not a constitution in the formally conventional sense, but rather material constitution that speaks to those social practices that are regarded as the basic norms of the European society. The Court of Justice and national constitutional courts have developed the means to determine the contents of this material constitution of the Union out of the basic constitutional materials (the founding Treaties and the common national constitutional traditions).

So, it is not the Constitution in the traditional, rather static sense of “constitution” being the legal foundation of a classical State. On this basis, the European Constitution is in the making process since the fifties of the last century. Talking about the elements and structure of the European Constitution, thus, includes the national and European level of what is seen as one composed constitutional system, serving the interests of the citizens of the member-states

Key Words:, European Union ,European society, Constitution

1. Basic remarks about the European need of a Constitution

Generally, in Europe exists a number of academic and legal opinions that claims that European Union already has a constitution. Actually, it is not a constitution in the formally conventional sense, but rather material constitution that speaks to those social practices that are regarded as the basic norms of the European society.¹ The Court of Justice and national constitutional courts have

¹ Habermas, Grimm, Menéndez and Möllers remind us of an important three distinctions in the conceptualization of a democratic constitution: a material constitution, a formal constitution and a constitution in the normative sense. This means that a constitution not only has to be written and effective, but also has to be connected to democratically enacted law. It has to stems from the people and can be amended by them. The EU have already a few constitutional Treaties: Treaty of the European Coal and Steel Community (1951), Treaties of Euroatom and the European

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Some analysts, like Maduro, for example, find that existing material constitution is the best constitution that the EU can ever get. Following this main point, Dieter Grimm goes further in explanation that since there is no European people there can be no European constitution.

Referring to the fact that the European Union does not have European people and cannot constitute a state in the classical sense of the word, some academics argued that the EU would not need a Constitution.³

But, other side of this logic is that, by establishing progressively the European Union through their respective national institutions, these citizens have defined themselves as citizens of the Union, and added a new, European, identity to their national, regional and local identities. The citizens will and must be the ones who may or may not agree on the re-arrangement of the division of powers between the member-states and the Union, on the revision of the institutional structure of the Union, as well as on the common values and fundamental rights to be made a binding foundation of the Union.

Joseph Weiler focuses on the risk that a constitution in a formal sense—especially if there were some attempt to depart from the international law basis of the current arrangement and to assert that the EU could be legitimated via popular participation at the present stage of its development—would upset the

Economic Community (1957) as a Founding Treaties. See: *Developing a Constitution for Europe*, Edited by Erik Oddvar Eriksen, John Erik Fossum and Agustin José Menéndez, Routledge Studies on Democratizing Europe, Taylor & Francis Group, London and New York.

2 See: I. Pernice, “Multilevel constitutionalism in the European Union”, *E.L.Rev.*, page 511-529, especially at 514-516, (2002).

3 Not only academics were skeptical about the opportunity of existing the totally new formal Constitution, but also the Eurobarometer findings in February 2004 showed that for the total of 25 countries, 62% of all respondents agreed that their country had to get ready to make concessions in order to enable the constitution of the EU come into life.

See: European Commission, *Flash Eurobarometer. The Future European Constitution*, February 2004, in: www.europa.eu.int/com/public_opinion/flash/fl159_fut_const.pdf.

delicate constitutional balance based on “tolerance” which he identifies as the basis for the EU at the present stage.⁴

Why, then, do so many Europeans favor the drafting of a constitution for the European Union?

As many analytics have said, the Laeken mandate for the Constitutional convention contained, in fact, little direct focus on the constitutional question, but provided instead a general analysis of the “state” of the European integration process and its challenges, with special emphasizes on the four main issues:

- re-defining the competences of the EU, or what is the European Union and what functions ought it to serve (sets up institutions, their decision-making procedures and the conditions according to which the persons responsible are elected and nominated);

- status of the Charter of Fundamental Rights, because it is hard to imagine a modern liberal polity with constitutional pretensions without some form of bill of rights as a definitive statement of social, political and civic values,

- existing treaties have to be merged to one unique treaty, consolidated and simplified, and

- role of national parliaments.

The special point of those questions is the goal of transparency.

There are aspects of the existing constitutional law of the EU, which have escaped logical explanation, such as the system governing the attribution, exercise and control of competences, or which are generally accepted not to be working particularly well, such as the concept of subsidiarity. It is important not to confuse the proportion that the EU has a constitutional framework with the debate about whether Europe ought to have a Constitution.

⁴ He argues that, “constitutional actors in the member-states accept the European constitutional discipline not because, as a matter of legal doctrine, as is the case in the federal state, they are subordinate to a higher sovereignty and authority attaching to norms validated by the federal people, the constitutional demos. They accept it as an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe to a norm which is the aggregate expression of others wills, other political identities, other political communities”. See more in: *The Covention on the Future of Europe, Working Towards an EU Constitution*, Jo Shaw, Paul Magnette, Lars Hoffinan & Anna Vergés Bausili, The Federal Trust for Egucation & Research, page50.

The main objective of the so called European Constitution must be to obtain a text which-as it has been emphasized by Jacques Chirac⁵-can be called a constitution, while it would not be the legal foundation of a “super-State”, as Tony Blair has underlined⁶, or of a “federation of nation-States”, a description originally proposed by Jacques Delors, and taken up by many others including the presidents Carlo Azeglio Ciampi⁷, Johannes Rau⁸, and, in a slightly different way, Joschka Fischer.⁹

2. Reality of the project “Constitution of Europe”

Signed in Rome on 29 October 2004, the “Treaty establishing a Constitution for Europe” marks a significant step forward toward the overall level of “codification” of the EU core documents. Notwithstanding the inherent unpredictability of the ratification process that might last, the European Union has begun a new chapter in its history. Almost fifty years after the conclusion of the Treaties of Rome, this stage constitutes the “second founding moment of Europe”.¹⁰

Why the EU pursue the project of a Constitution for Europe? This question is interesting to be seen from three angles:

1) accomplishing immediate political goals of the EU, although it is clear that original political aims of EU have lost much of their relevance,

2) dilemmas stemming from virtually irreversible decisions of the past (to put an end to the bloody history of warfare between European nations), and

5 J.Chirac, Notre Europe, Speech to the German Bundestag, 26 June 2000, online:www.elysee.fr.

6 T. Blair, A Larger, Stronger, more Democratic Europe, Speech to the Polish Stock Exchange, Warsaw, 6th October 2000, online:www.number-10.gov.uk.

7 President C.Ciampi, Speech at Leipzig University, 6th of July 2000, and Speech at the ISPI, 3th of July 2001, both reported in: A.Battaglia/G.B.Grimaldi, An Overview of Leader’s Statements, in: EuropEos (ed), Institutional Reform in the European Union:Memorandum for the Convention, 2002, page 225.

8 President J. Rau, Speech to the European Parliament, 4th of April 2001, reported in: A.Battaglia/G.B.Grimaldi, supra, note 16, p.233.

9 J. Fischer, Vom Staatenverbund zur Federation-Gedanken über die Finalität der Europäischen Integration, FCE-Spezial, 2/2000, www.whi-berlin.de/fischer.htm.

10 See: Ludger Kuhnhardt, “From national identities to European Constitutionalism”, Discussion Paper C141, Center for European Integration Studies, University of Bonn, 2004. American historian Joseph Ellis has coined this term to characterize the completion of the American constitution in 1787, about half a generation after the United States had gained her independence in 1776. In the US, the work of the “Founding Fathers” was followed by the success of the “Founding Brothers”. See: Joseph Ellis, Founding Brothers. The Revolutionary Generation, New York:Knopf 2000, p.9.

3) the straightforward economic argument that a unified Europe was the surest path to growth and welfare.

Since the Coal and Steel Community of 1951, and the subsequent formation of Euratom and the European Economic Community of 1958, more and more countries have become gradually integrated through the free exchange of people, goods, services and capital between them—a process now completed by the single market and single currency.

The European Union frames an ever denser network of trade-relations, “foreign” direct investment, financial transactions and so forth. Alongside the United States of America and Japan, Europe has gained a rather strong position within the so-called Triad. Thus the rational expectation of mutual benefits within Europe and of differential competitive advantages on world markets could, to date, provide a legitimation “through outcomes” for an ever-closer Union.¹¹

The project “European constitution” opens a new chapter for European future and identity. It begins to “constitutionalize” the European integration process and to give new meaning to the search for political finality of this process without providing final, consistent and comprehensive answers yet.

In order to enter into force on 1 November 2006, as originally designed, the European “Constitution” had to be ratified by all member-states before this concluding date. In the event this fails, according to Article 447-IV of the Constitution, it would enter into force on the first day of the second month following the deposit of the instrument of ratification by the last signatory member-state.

It is completely understandable that in a twenty-five member Union the risk of some member states failing to ratify the Constitutional Treaty is high.¹²

The question of not accomplishing the whole ratification of the Constitutional Treaty has definitely been discussed and considered during the drafting of the Treaty, both formally and informally.

The Article 447, as well as Declaration 30 annexed to the Treaty, refers to this issue. However, the creators of the so-called Constitution of Europe did not create an alternative plan in case of problem about the ratification process.

11 Jürgen Habermas, *Why Europe needs a Constitution?*, *New Left Review* 11, September-October 2001.

12 Interesting comments see in: http://news.bbc.co.uk/1/hi/talking_point/4592431.stm.

If the agreed among the Member-States is not realizing, the creators of the Treaty will find themselves in a very unpleasant situation concerning the fact that substitute course of action had been left undecided.

According to the opinion of the most analysts, the compromise already reached in the "Constitution" is already enormous, that the member-states are not prepared to go forward one step more. On the other hand, such an omission could be intentional.¹³

So, the official alternative plan, in case of unsuccessful ratification in all member-states of the EU of the existing version of the European Treaty, does not exist. It is true that in the politics of the states which are traditionally eurosceptics exists enormous dark scenarios about the Constitutional Treaty of the EU, and its future. Especially, after the negative referendums for the draft-version of the Treaty in France and Holland, and the United Kingdom "pushed aside", the situation with the "Constitution" become even more dramatic¹⁴

What is happening in the EU about this issue can not be defined as catastrophe yet, but still can be marked as a beginning of discussion intensified period, with different proposals and options.

The ratification crisis about the Constitutional Treaty can not be explained only with the analyses of the politics of the two or three of the 27 EU member-states.

The agencies which are following and researching the public opinion of the EU citizen's, notices that the defeat of the "Yes" campaigns for the Constitutional Treaty is, per se, manifestation of popular distrust for the governments of France and Holland, or, a product of the low standing of

13 See: Chrysoula Diakatou, "What Happened To The Treaty Establishing A Constitution for Europe?", Intern, ELIAMEP, 14 July, 2005.

The crisis over constitution-making itself that was brought about by the EU Heads of States and Governments in December 2002, who were unable to find agreement on the draft Constitutional Treaty. The Constitutional Convention has presented the draft to them in June 2003 until last minute compromises were found in the summer of 2004, which were face-saving although not uplifting.

14 See: Brussels in Crisis, EU Summit Collapse is "Historic Failure", by Hans-Jurgen Schlamp and Frank Dohmen, <http://service.spiegel.de/cache/international/spiegel/0,1518,361374,00.html>

Jacques Chirac, the French ex-president, and Jan Balkenende, the Dutch prime minister.¹⁵

According to some opinions, the popular distrust is a result of citizen's dissatisfaction about the new restrictions on national sovereignty. On the other hand, the main reason for the popular distrust is the EU rapid enlargement with new member-states which created the European system with many failures. Nevertheless, European commissioners are persistable about the future enlargement of the EU.

After any kind of a positive signal for possible further enlargement of the EU, there are huge negative reactions from the citizen's of the EU on this issue.

For example, for every European citizen Turkey is known as a country with cheap labour and market. If one day Turkey become a new member-state of the EU, that will in practice mean that those elements of the Turkey economy will be involved into the European system. For this reason, the European leaders will have to think more carefully whether continued "chaotic expansion into the east" could bring about the collapse of the European house itself.¹⁶ And what is France if not the cornerstone of that house?

The initial reaction in Brussels after two consecutive rejections of the European Treaty by referendums was that the ratification process should continue in order for all member-states to have the chance to express their will about the Treaty. There was a general agreement about the need for continuing the ratification process of the Treaty.¹⁷

Suspending the process would leave the EU in a state of uncertainty and would make it more difficult to determine the reasons for the current crisis, and, therefore, possible ways to emerge from it. EU leaders seem willing to stick to their initial commitments towards the Treaty, but they can not find a proper way through which to accomplish such an objective. It is obvious that the European's political elites have only themselves to blame for what has happened.

15 See: YaleGlobal Online, Mikhail Gorbachev and Alexander Lebedev, "The Cracks in Europe's Expanding Empire", The Financial Times, 26 July 2005, <http://yaleglobal.yale.edu/display.article?id=6063>.

16 Ibid, <http://yaleglobal.yale.edu/display.article?id=6063>.

17 Joint Declaration:IP/05/627&Joint Statement:IP/05/653.

They were victims of their own "Europhoria"¹⁸, which has made them deaf to the rising popular revolt against the general European policy that subordinates all human concerns and needs. It is obvious that the process of suspending the constitutional referendums in other member-states is more than real.

But, at the same time, we cannot dismiss those who find many arguments in favour of ending the ratification process. There are numerous pros and cons both in continuing the process and in definitively suspending it. Mid-way between the two, some Europe's leaders will chose much more practical option: to neither continue the process nor suspend it for good, but rather to suspend it temporarily but indefinitely. This practicly means doing nothing, or, allowing to every member-state whatever it wants. The lack of instruments or mechanisms in the European Treaties for reaction in this concrete situation, open "the air" of buying the time for leaders whose credit is running low.

Now that the great virtue of the text, the unanimity of the 27 member-states, has been demolished from the ground up by the citizens as irritated with their own governments as with Europe itself, the time has come to decide what EU want to do: another Constitution consisting of a mishmash of principles, existing treaties and practical policies? A temporary arrangement to get out of a tight spot with pragmatic policies Or a true political union?¹⁹

Renegotiating the Constitutional Treaty is impossible mission, because it is already a result of a huge compromise between the member-states. Aware of this situation, the European think tanks produce numerous scenarios about the future of the Treaty. Proposals ranged from the least possible option of a renegotiation of the Constitutional Treaty, to the most likely scenario of a so called "Treaty-of-Nice-Plus". There have been many proposals on selecting some "good things" from the Constitutional Treaty and make them happen anyway, procedure so called "cherry-picking".²⁰

18 Diana Johnstone, "Revolt or Revolution? The French are At It Again", Paris, France, April 26,2005, <http://www.counterpunch.org/johnstone04262005.html>

19 The question underlying the solution to the crisis is whether certain governments, including those of France and the Netherlands among others, believe that the strategy for regaining the legitimacy of the EU necessarily means that the Union will have to settle for accomplishing less: a smaller budget, a smaller internal market, less immigration, more modest ambitions, less liberalization, an even, some would say, less monetary union. See: Jose I. Torreblanca, "A "Plan B" for the European Constitution: Looking the Other Way", Real Instituto Elcano, ARI No 77/2005.

20 About this procedure see more: Sebastian Kurpas, "What Could be Saved from the European Constitution if Ratification Fails? The Problems with a "Plan B", CEPS, Brussels, May 2005.

However, most of the Constitutional Treaty provisions cannot be applied informally. Therefore one of the possible variant in the future about the Constitution will be organizing a mini-intergovernmental conference in which it will be deciding upon amendments to the Treaty of Nice.

The Heads of State and Governments failed to reach an explicit agreement both on the current status and on the future of the Treaty, but, they realize that a period of reflection and wide debate in member-states is necessary since it is impossible to proceed as if nothing has happened with ratification process. Any decision other than to suspend the ratification process would widen the gap between the political class and the citizens.

3. What's wrong with the Constitutional Treaty?

The EU is facing a major crisis about the Constitutional Treaty that will hardly respond to small measures. In principle, it was the Union grand attempt at founding itself anew. However, in the opinion of many, the European Constitution rationalized what was already in existence and offered a number of improvements, but also many things they find wrong.

No one in European Union is quite sure what it is this document. Jurists point out that it is just another international Treaty, not a real Constitution. But since it has been presented to the public as a Constitution, people naturally judge it as such.

It is extremely long document, 482 pages in the English version, in four main sections totaling 448 articles, plus an endless series of annexes and protocols. This make it hard to understand and much harder to accept.

Unlike any normal Constitution, it goes beyond defining institutional structure to spell out in considerable detail the policies the European Union must follow.

Does Europe in its present shape meet the conditions necessary for the establishment, not simply of a confederation, but a federation of nation-states as cited in Constitution? The EU must address first the familiar objections of the Eurosceptics, and then deal more specifically with some of the prerequisites for a Union that would assume at least some qualities of a state.

As it is familiar, Eurosceptics reject a shift in the basis of legitimation of the Union from international treaties to a European constitution with the argument, "European Demos does not exist". According to this view, what is missing is the very subject of a constituent process, the collective singular of "a people" capable of defining itself as a democratic nation, although a nation of citizens must not be confused with a community of fate shaped by common descent, language and history. Europe has to challenge the myth of the missing demos as the root cause for its inability to generate a sufficiently solid public sphere.

Europe will have to resort continuously to pragmatism that argues in favor of issues and challenges of a future-oriented nature as first priority instead of becoming trapped by ghosts of past divisions. In the early 21st century, these ghosts still exist and could be revived easily. It is thus all the more a question of responsible political leadership to guide the European body politic during the next periods of its development. Such guidance could help further transformations of European identity. These transformations would not be the result of theories of integration, but rather of responses to concrete challenges.

This confusion fails to capture the voluntaristic character of a civic nation, the collective identity of which exists neither independent of nor prior to the democratic process from which it springs. Such a civic, as opposed to ethnic, conception of 'the nation' reflects both the actual historical trajectory of the European nation-states and the fact that democratic citizenship establishes an abstract, legally mediated solidarity between strangers.

The Constitution is "concluded for an unlimited period" and can be amended only by an extremely tortuous process requiring unanimity of all member-states. The "security and defense policy" is tied to current U.S. foreign policy doctrine, notably by the stress on combating "terrorist attacks" and on military contributions to the "fight against terrorism".

The EU Charter of Rights falls short of both the Universal Declaration of Human Rights and most Western European national constitutions, including those of France, Germany, and Italy.

One thing is clear.

The European Constitutional Treaty is not a revolutionary document. In fact, paradoxical as it may seem, the Maastricht Treaty brought a supranational constitution, but not a political union. For this reason, the best thing about the constitutional text was simply the fact that it existed.

4. Conclusion

The EU is facing a huge crisis which it will be difficult to overcome without concrete and more serious strategy of action. The European Constitutional Treaty is qualified as a step forward in the process of (re)anew of the EU infrastructure. However, in opinion of many, this Treaty is more of a judicial re-hash than a truly new constitution. It is obvious that the EU will go on functioning according to most recent of its treaties, the Treaty of Nice, until 2009.

The juridical situation will be unchanged. Politically, the French and the Dutch “no” will create a salutary shock wave through Europe. The prospect will open to enact radical transformation in the foundations of the EU-upwards social harmonization, the universal right to social services, a progressive industrial policy, dissolution of NATO, etc. In this meantime period, the EU has the obligation to be concentrated on three questions:

first, creation of so-called functional federalism, incremental progress towards political union. The most important legitimacy test for the European Union during the next decades will be whether or not it contributes to reconciliation of differences while at the same time generating strength through shared interests and future-oriented common perspectives;

second, striving to combine social and economy concerns with global liberalization and economic efficiency and

third, the consolidation and strengthening of the EU position in the world. European Union should worry about its capacity for influencing the path of global developments in the 21st century. The world might well live with a weak Europe, but Europe might not be happy to live with the consequences for itself.

The future of the Constitutional Treaty indeed remains uncertain.

No one is able, at this stage, to say with certainty whether the Constitutional Treaty is “dead or alive”. One thing is for sure-EU leaders have to work hard in order to regain the confidence of the public opinion. And that is the hardest task to do...

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ЕВРОПСКИ УСТАВ – ДИЛЕМЕ И ПЕРСПЕКТИВЕ

Начелно, у Европи постоје академска и стручна мишљења према којима Европска унија већ има свој устав. То, заправо, није устав у формалном, конвенцијалном смислу, већ устав у материјалном смислу који отеловљује оне социјалне норме које се сматрају као основне норме европског друштва. Европски суд правде и национални уставни судови развили су средства опредељивања садржине овог материјалног устава Уније из основних уставних материјала (оснивачких уговора и заједничке уставне традиције).

Дакле, овај устав није устав у традиционалном, статичком смислу, као правни темељ класичне државе, већ творевина која је још од педесетих година прошлог века у процесу настајања. Разматрање елемената и структуре европског устава зато подразумева и национални и европски ниво онога што чини сложени уставни систем, а што треба да служи интересима грађана држава чланица.