

DOES THE EU HAVE A SUBSTITUTE FOR A CONSTITUTION? THE RULE OF LAW AND COMMON IDENTITY¹

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Abstract. Constitution, like no other legal act, is the manifestation of what a community thinks of itself; what are its aims, values and priorities. But what if this common source of identity is lacking? Can a body politic exist without constitution? If yes – does it come at certain price?

Over a decade after the failure of a constitutional project for Europe I would like to ask whether EU has any substitute for the constitution for the following 10 years. I will consider that questions from two different standpoints – the rule of law and common European identity. First, I will ask whether existing legal order of EU needs the constitution to be consistent with the rule of law principle. This question was of great importance in Poland, as this decade started in our country with the EU triggering Article 7 of the Treaty of EU with the charge of breaching by Polish government the principle in question.

The recent events however have drastically changed the situation in European Community. The observance of the rule of law does not seem enough for EU to assert its legitimacy in the course of the ongoing turmoil caused by the pandemic. What is needed is unprecedented solidarity among European Citizens – solidarity which transgresses the demands of mere justice. I will claim that to maintain solidarity a common identity may be necessary. Thus, I will ask whether the constitution is necessary for the forming of European identity and whether it would be enough to achieve this aim.

Keywords: constitution, treaty, identity, rule of law, solidarity, community.

INTRODUCTION

The beginning of the new millennium marks, in the history of the European Union, the consequential fiasco of the European constitutional project. The reasons for this failure were complex and their analysis exceeds the scope of this article. On the one hand each individual Member State wished to ensure for itself maximum influence on decisions taken in the community, on the other, more ideological, hand there were profound differences in the understanding of European identity, its sources and current shape. It is difficult to clearly determine which of these problems turned out to be decisive, but it is worth remembering that the Lisbon Treaty adopted in 2007 included many of principles concerning the functioning and structure of the European Union, which were initially rejected as part of the European constitution. This fact allows us to put forward the thesis that the disagreement on the consolidation of the European community through a full-fledged constitutional

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act resulted from deeper objections than just doubts about the proposed changes in the organization of the Union.

The idea of working on a joint constitution for Europe was virtually abandoned after this first defeat. Neither politicians, nor representatives of academia, nor even European citizens themselves seem to be the least interested in bringing this prematurely dead concept back to life. The arguments which ignited works on the first constitutional draft are no longer the subject of discussion. Nobody wonders any longer why Europe once desired constitution and what were to be its tasks, besides technical transformations in the functioning of the community, which the Lisbon Treaty did well enough. So, is the European Union at the beginning of the third decade of the 21st century in need of constitution at all? I will try to answer this question by looking at the Union from two perspectives – first, I will look at it as at a political organism exercising the rule of law, and second, as at a community of people united by common identity and solidarity. The first understanding of the Union dominated, as it seems, in the decade just past. The second may prove crucial for its survival and prosperity in the next decade.

THE ROLE OF CONSTITUTION IN THE BODY POLITIC RULED BY LAW

In a democratic system, the constitution performs countless vital functions. However, having in mind the rule of law, there are four of them which are crucial. First, each constitution limits the power and determines the shape of government. The bulk of constitutional rules is concerned exactly in making very detailed arrangements concerning the division of power, election models and competences of crucial state bodies. Secondly, the constitution protects the fundamental rights and freedoms of persons in its territory. Thirdly, it serves as the supreme law, a measure by which the validity of all other provisions is assessed, which, by the way, does not preclude its direct application in certain circumstances. And finally, the constitution is a source of values and principles that serves as the standard of interpretation of all norms existing in the legal system. To the extent that the constitution performs these functions, it enables the existence of the rule of law – the principle according to which the authority of law delimits the activities of power and all other entities in a given body politic (Waldron, 2020).

The significance of the rule of law in the political and legal system of the European Union cannot be overestimated. Especially recent years have brought recognition of its role as both a legitimizing principle of the Union's actions and a standard enabling an objective assessment of the state of democracy in individual Member States. This emphasis on the rule of law was specifically articulated during Finland's presidency of the Council of the European Union in the second half of 2019. Finland recognized the rule of law principle as one of the basic pillars of the Council's activities, alongside such values as competitiveness, social inclusion and climate leadership (Finnish Government, 2019, p. 5). At the same time, the respect of Union institutions for the rule of law was reflected in proceedings against Member States implementing reforms that threatened the separation of powers, political pluralism and directly violate their national constitutions. An example of these activities is the proceedings against Poland based on art. 7 item 1 TEU.

In the context of our considerations, it is worth looking at the way in which the European Commission informed about the grounds for initiating this proceeding. As we can read in the official press release:

*“The European Commission decided to refer Poland to the Court of Justice of the EU due to the violations of **[4] the principle of judicial independence** created by the new Polish Law on the Supreme Court, and to ask the Court of Justice to order interim measures until it has issued a judgment on the case.*

(...)

*The European Commission maintains that the Polish law on the Supreme Court is **[3] incompatible with EU law** as it undermines the principle of judicial independence, including the irremovability of judges, and thereby Poland fails to fulfil its obligations under **[1] Article 19(1) of the Treaty on European Union** read in connection with Article 47 of the **[2] Charter of Fundamental Rights of the European Union**” (European Commission, 2019).*

In the quoted passage we find a reference to all four functions of the constitution we have listed above. Therefore, first, we have reference to the Union political system and the place of the judiciary in general, and the individual adjudicative organs in particular, in the structure of power [1]. Secondly, we are informed that Poland violated the right to a fair trial which is listed as one of the basic human rights and freedoms guaranteed by the European community [2]. Thirdly, the EU law is considered to be hierarchical over national legislation and is used as a standard for legislative control [3]. And fourthly, Poland’s fundamental guilt was to breach the principle of the independence of the judiciary, which is claimed to underly the EU legal and political order [4].

From the above, it seems that the European Union has at its disposal legal tools that perform functions analogous to those of the constitution, at least to the extent necessary to secure the realization of the rule of law. The Court of Justice itself expressed the same view on the constitutional nature of EU treaties:

*The EEC Treaty, albeit concluded in the form of an international agreement, none the less **constitutes the constitutional charter of a Community based on the rule of law**. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (see, in particular, the judgment in Case 26/62 Van Gend en Loos [1963] ECR 1). The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (The Court of Justice, 1991, emphasis added).*

The theory developed by professor Neil Walker casts another, interesting perspective on the problem. Walker described the necessary features of a self-contained legal system. He claims that the necessary characteristics of “thin” constitutionalism, this is constitutional order without constitution, are (1) the self-ordering of legal system, which refers to the capacity of this system to reach and regulate all matters within its domain, (2) self-interpretation, which means the capacity of some organ (or organs), typically located in the judiciary, to have the final word as regards the meaning

of its own norms, (3) self-extension referring to the capacity of a system to determine the extent of its own jurisdiction, (4) self-amendment refers to the existence of a procedure enabling the change of content of the legal order, (5) self-enforcement which determine the ability of the legal order to secure the application and implementation of its own norms and finally (6) self-discipline which refers both to the generality and predictability of system's decisions and to the subjection of any power to the rules of community (Walker, 2012, p. 7-9/20).

According to Walker, EU almost fulfills the test based on above criteria as (1) EU legal instruments are generally effective in regulating the full spectrum of issues where the EU has competences, (2) ECJ has consistently strengthened its position as a judicial authority responsible for the final interpretation of European law, (3) the doctrine of implied powers enables further extension of EU competences, (4) there is a clear tendency toward simplification of the procedure of revision of treaty provisions and (5) the doctrine of the 'direct effect' of EU norms in national legal orders turned out to be effective tool of securing execution of EU law by member states.

The greatest problem for EU, Walker says, is to be self-disciplined, especially in the second understanding of the term. The great bulk of the competences and principles listed above were developed by European institutions without clear mandate from member states (Walker, 2012, p. 8/20). But is not it the most characteristic feature of any constitutional order? Habermas called the relation between democracy and the rule of law paradoxical, as the latter constrains the former which had to be initially unconstrained to put the constitution – law in place (Habermas et al., 2001). The same is well visible in a famous claim by Schmitt: "a constitution is not based on a norm, whose justness would be the foundation of its validity. It is based on a political decision concerning the type and form of its own being (...) There cannot be a regulated procedure, through which the activity of the constitution-making power would be bound" (Schmitt, 2008, p. 130). Later on, we will look again at Habermas and at Frank Michelman to try to resolve this paradox. Now, let us conclude what we have said so far.

The EU legal system meets the minimum requirements necessary for the rule of law to exist and in this respect has an effective substitute for the constitution. A brief glance at the history of the European community allows us to understand why this principle was (and is) so appreciated in the Union, and at the same time it explains why Member States considered its protection both necessary and sufficient condition to achieve the desired level of unification, at the same time giving up on a full-fledged constitutional document. The European Union has its source in the European Coal and Steel Community which was established to maintain international peace by creating a common economic interest between France and Germany. Indeed, the essence of all subsequent incarnations that the EU went through was economic cooperation. And nothing guarantees the flourishing of entrepreneurship, profits from international trade and stable economic growth as effectively as good, predictable and impartial law (Yu, 2015; Chow et al., 2014). So, as long as economic growth remained in the centre of international attention, and, above all, within the reach of the Member States, protection of the rule of law was a sufficiently strong binder and an incentive to remain in the community, despite numerous deadlocks. Thus, one could see the failure of constitutional proj-

ect as an “evidence of the success and stability of the existing” European constitutional settlement (Moravcsik, 2006, p. 219).

But 2020 has shaken all previous beliefs and aspirations. COVID-19 pandemic represents a powerful economic blow to all the countries of the European community, without exception. Dreams of continuous growth have fallen apart. But they were never anything but dreams. Because even if it was not for the coronavirus, national economies would have to slow down in the face of the impending climate collapse. What does this mean for the future of Europe? Is the humble compliance with the law enough to ensure that, in the face of upcoming crisis, the next decade brings something more than the progressive decay of the community, the decay initiated by leaving of her first member?

CONSTITUTION AS A SOURCE OF COMMUNITY

To answer this question, let us return to our reflection on the European constitution. We have already analyzed the legislative function of constitutional act. But any constitution has yet another, even more important, task than creating the legal framework for the existing community. It creates this community itself. It creates its own authors. It was this function of the constitution that Tushnet meant when he wrote: “A people can be constituted in many ways. But any one people is historically constituted in only one way. And here is where constitutional law comes in. It is, or should be, a commonplace that **the people** [of constitutional democracy] **are constituted by the Constitution**”, adding strongly: “We could mistakenly treat the Declaration and the Constitution as the organic seeds of a process that has been working itself out over history ... That denies that we are dealing with a project, that is, a self-creating activity ... We are self-creating, and so have the power to reconstitute ourselves at will” (Tushnet, 1997, p. 1559, emphasis added).

The constitution in this sense is a conscious fact of self-determination. On the one hand, its creation is possible only thanks to the pre-existing relations between the entities establishing it, on the other, it goes much beyond the existing state of affairs. Hence its character is not only declarative, but also performative, as it literally constitutes the future. The same intuition is evident in the words of Justice Holmes when he says: “from the perspective of the constituent power, the constitution is a human political construction. It denotes the moment ... of **the self-institution of society**. (...) **Constitutions do not merely limit power; they can create** and organize power as well as give power a certain direction” (Holmes, 1995, p. 228, emphasis added) or in Schmitt word’s: “The constituent power is the full immediacy of a legal power not mediated by laws, a type of **law that precedes the state**” (Schmitt, 2006, p. 73). These abstract considerations can be easily translated into the language of European praxis. EU Constitution could, in specific circumstances and under certain conditions, establish new people – European People endowed with European identity. Before we set off to determine these circumstances and conditions, let us first clarify how we do understand identity and why we believe it is of such a great importance for our discussion.

The sense of identity stretches between two poles. On one side there is the awareness of being in the essential sense the same as other members of my own group. However, it is not enough to feel that I am like the others which I identify myself with. I must also be recognized by them as one

of them (Honneth, 1992). On the other side there a sense of a fundamental difference between me and those whose identity is different (Connolly, 2002; European Commission, 2012, p. 22). Thus, the basis for the sense of identity is, first of all, the mutual perception of belonging and, secondly, opposition to however defined “others”.

The basic evolutionary function of identity was to define the members of one’s own category (understood in different ways, depending on the circumstances), who should be supported in case of danger. Hence, the collective identity was the evolutionary incubator of the sense of solidarity: “Communities connect us by means of our disposition to show special concern and loyalty to people with whom we share things. Community, I shall argue, has taken so many different forms because human beings share so many different things—from places and practices to beliefs, choices, and lineages—that can be imagined as sources of mutual connection” (Yack, 2018, p. 4). Research shows that common identity creates a sense of sympathy for persons with a shared identity, which generates the initial motivation for concern for the disadvantaged from the group and creates a sense of trust that is a precondition for individuals to act on their sympathy (Miller, 1995).

From the above, very specific conclusions can be drawn for each political organism operating in the model of “welfare state” and based on solidarity of stronger (and simply speaking – richer) members of the community with those who, for various reasons, are at a lower level of prosperity. And exactly such an organism is the European Union. According to scholars a sense of solidarity is not so crucial “to social programs that protect the population as a whole as in the case of health care which largely redistributes resources from the healthy to the sick, or pensions which redistribute resources to those who live longest” (Johnston et al., 2010, p. 355). However, “policies that explicitly redistribute resources on a vertical basis to the poor, such as welfare and unemployment benefits, require that better-off people “identify with the beneficiaries of the redistribution—an identification fostered by a sense of common national identity” (Miller, 2006, p. 328). To quote the most straightforward opinion on the matter: “the question of for whom are people willing to pay has replaced the traditional question of for whom they are willing to die as a test of collective affinity and solidarity³” (Gat, 2012, p. 321).

It is exactly the constant emphasis on the value of solidarity that not only defines the policy of the European Union (at least in its program declarations⁴), but also constitutes a feature that distinguishes it from other political associations, in particular the United States, with which the EU has always struggle for leadership in the democratic world⁵. This solidarity was to be at the heart of the

3 This pragmatic attitude toward the European Community is well visible in national politics. Gdy jeden z polskich kandydatów na urząd prezydenta postanowił wyrazić na Twitterze swą radość z okazji rocznicy wstąpienia przez Polskę do EU he wrote: “16 years ago Poland became a member of the EU. Today, we are part of a community that has supported our country with EUR 7,5 billion to fight coronavirus and save jobs” (Biedroń, 2020).

4 This struggle over identifying the credible vision of European exceptionalism is well-described by Muller: “We might want to ask whether there is a kind of constitutional morality that fits within the constraints of moral universalism and yet is also in some sense specific to the EU. We are, if anything, looking for a “moral surplus,” you might say, that the Union generates—and if there is no such moral surplus, then of course that should honestly be admitted” (Muller, 2007, p. 120).

5 See: “The constitutional treaty affirms the notion that Europe can find its identity only in delimitation from, perhaps even by standing against, the U.S. The delimitation arises, on the one hand, from the European social model (...)” (Bogdandy, 2005, p. 311).

constitution for Europe. Hence, in the preamble to this act we could read that “Europe, reunited after bitter experiences, intends to continue along the path of civilization, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived” (Treaty establishing a Constitution for Europe, emphasis added). The same idea permeates the European Commission claims that the Union’s development direction changed and although the economic foundations are still essential, the Constitution places the European citizen at the forefront.

But is giving European people such a constitution enough for the emergence of common identity among them? Obviously, the answer is negative. As I have said before, special circumstances must be present and demanding conditions must be fulfilled for the birth of a community from constitutional foam. Bogdandy is right when he says that “constitution directly affects identity formation, if it is a criterion per se for the relevant identity process”. Regrettably, it is “a long way from a constitution, which is initially a mere constitutional text, to the psychological processes of self-categorization by citizens. (...) This would require that the large majority of citizens identify and affiliate with their group on the basis of the constitution, as such, or on the basis of specific constitutional principles” (Bogdandy, 2005, p. 299). Bogdandy is right. But however accurate this statement is, it is still too obscure for our needs. It does tell us that something more is necessary to make the people from scattered nations of Europe but it does not show us what it is. We still do not know how the identification with constitution or with its specific principles can be triggered.

Nevertheless, the answer for this question is given when Bogdandy reveals us the painful details of constitutional negotiations. He recalls, that Intergovernmental Commission, which was responsible for the preparation of the draft of the constitution rejected “most dangerous, and possibly even foolish” proposal, namely stating in the introduction to the project that it is democracy which makes the highest value of the Union (Bogdandy, 2005, p. 309). The argument which the scholar gives to justify this amendment is crucial to understand the true reasons behind the failure of constitutional dream:

To suggest democracy as the Union’s primary value is risky. (...). Many citizens may—rightly—believe that democracy’s status in the Union is not fully satisfactory; moreover, considering the institutional alterations, the constitutional treaty is unlikely to improve significantly the so-called democratic deficit. Thus, discord would have been likely between the draft constitutional treaty’s most prominent declaration and the everyday experience of Union citizens. This would not have helped to foster identity but, rather, alienation and cynicism (Bogdandy, 2005, p. 309).

From here, one only need one step to reach the conclusion that “*the inclusion of citizens in political decision making is considered paramount to the formation of collective identity*” (Bogdandy, 2005, p. 312). Habermas makes the twin claim saying that „the substance of the constitution will not compete with the sovereignty of the people only if the constitution itself emerges from an inclusive process of opinion- and will-formation on the part of citizens” (Habermas, 2001, p. 771). And this is exactly this feature of constitution-making that makes Michelman believe that the paradox between democracy and the rule of law may be resolved. According to him, the only way to reconcile these

opposing values is to perceive the constitution as a project which continues across generation and never ceases (Habermas, 2001, p. 768).

Here again the hard-scientific research can be used to back these somewhat abstract ruminations. It is now commonly known that participation in group-relevant collective events increases one's investment in such group identities. And that, furthermore, even one-time experience of participation much increases chances of further involvement in collective activity. This effect is said to be strongest in case of, so-called, collective self-realization. What it means is that it is physical presence among other people involved in the same enterprise that makes the process of identity-formation accelerate (Khan, 2016). Needless to say, joint success bonds people stronger than failure.

These considerations can be, again, quite easily transposed to the pragmatic decision about European constitution-making process. However, when we come back both to the historic reality of this process, and to the constitutional text which it gave birth to, it seems that this knowledge remained obscure for the European policymakers. The glimpse at the constitution preamble tells us more about it than any scholarly analysis: "grateful to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe", the introduction says and then a long list of these grateful rulers of the European world appears, in alphabetical order, starting somewhat symbolically with "his majesty the king of Belgians" and ending with assurance, that they "have agreed as follows (...)" (Treaty establishing a Constitution for Europe).

When the European Constitution was being prepared, many of us have just reached our civic maturity. However, no one asked us how we understand a common Europe, what constitution we want. And no one showed how we can influence its shape. The issue was absent in schools⁶, there were also few European, governmental and non-governmental, initiatives supporting grass-roots discussion, while those that were conducted were most often limited to superficial "for" or "against" agitation. At the same time, there existed an example of shaping constitution-making process in a way which would remedy all these deficiencies.

Over ten years before South Africa won its struggle to establish a constitution for a nation torn apart to the extent rare in the world. Being aware that no matter which side of the political dispute prepare a constitutional draft, it would not be able to gain legitimization in the eyes of the entire nation, The Constitutional Assembly decided to entrust the task of creating a constitution directly to the nation, to an extent unprecedented in modern democracies. Presenting the whole of this process exceeds the scope of this article, a few numbers which I will cite, however, makes the nature and scale of this undertaking clear. During the public consultation over 2 millions of grassroots amendments were submitted to the constitutional draft. 20,549 participants took part in the public meetings were oral submissions were recorded and transcribed. "Constitutional talk line" launched with the aim of raising the awareness of the constitution-making process answered more than 10.000 calls from citizens. There were 807 public events organized which explained the significance and intricacies of what is going on in the state and which were focused on provincial areas. Additionally, the

⁶ And we must remember that modern democratic states virtually no longer have any other fora for their citizens to physically meet in all their diversity.

Constitutional Assembly held 13 public hearings with 1,508 representatives from 596 civil-society organizations present on-site. There were also 259 briefings organized reporting to public opinion on progress in the constitution-making process. Furthermore, citizens could enroll to 486 constitutional education-oriented participatory workshops which preceded these public meetings (Ebrahim, 1999).

The contrast with European own constitution-making procedure is striking. The best opportunity to carve a European identity has been lost. What all it means is that 2004 Treaty establishing a Constitution for Europe, even if it was ratified by all the members states, would not have been sufficient to establish the European Community with common identity necessary to make it through the approaching decade jointly and severally. Or to say it in different words – even a Constitution for Europe would not have been effective substitute for European Constitution. However, this does not to have be the end of the story. As Rosenfeld puts it: “the popular rejection of a treaty or an accord—can be turned into part of a much more positive narrative; failure is a prelude to further inclusiveness, to hearing more voices, or hearing the same voices again with a different degree of attentiveness (Muller, 2007, p. 135).

CONCLUSION

The above discussion shows that the EU is able to protect the rule of law under the current legal order. However, the community lacks a binder that would make Europeans one family, united by a common identity and ready for collective sacrifices for each other. And this virtue will be crucial in the next decade. 2020 started with a serious dispute within the Union about the limits of mutual responsibility and liability of Member States. This dispute was settled in favor of deeper alliance in the face of pandemic, which was marked by creating the first time in the history of EU the, so-called, “debt union”, based on joint and several obligation of all members states for a debt of 750 billion euro incurred in order to secure recovery funding for European economies in crisis. This decision is certainly a big step towards dreamful “unity in diversity”, but the real test is still Ahead. In 2028 the EU must start to pay off borrowed money. And there will be many ideas on how to do this. It is a pity that we, Europeans, did not have the opportunity to promise each other in advance that we “are determined to transcend our former divisions and, united ever more closely, forge a common destiny” (Treaty establishing a Constitution for Europe).

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