

Philosophy of Law or Philosophy of Reason – The Idea of a Treaty Establishing a Constitution for the European Union

*By Daniel Galily**

The main purpose of the study is to analyze the feasibility and necessity of an EU Constitution. Briefly, the history of the draft constitution is as follows: The draft treaty aims to codify the two main treaties of the European Union - the Treaty of Rome of 1957 and the Treaty of Maastricht of 1992, as amended by the Treaty of Amsterdam (1997) and the Treaty of Nice (2001). The debate on the future of Europe is believed to have begun with a speech by German Foreign Minister Joschka Fischer in Berlin in 2000. The process began after the Laeken Declaration, when the European Convention was set up, chaired by former French President Valerie Giscard d'Estaing, with the aim of drafting a constitution. The draft contract was published in July 2003. After lengthy discussions and debates over the proposal for qualified majority voting, the final text was approved in June 2004 and signed by representatives of the Member States on 29 October 2004. The failure of the treaty in France and the Netherlands is a serious blow to the European Union because these two countries are considered to be loyal supporters of the European project. The text of the treaty was subsequently rewritten by the Amato Group, officially the Active Committee on European Democracy (ACED), a group of high-ranking European politicians. During the German presidency of the Union, a new treaty was proposed - the Treaty of Lisbon - to replace the original draft of the Constitution. On 12 June 2008, the Lisbon Treaty was also rejected in a referendum in Ireland. But if we want to look beyond history, we can ask - Why does the EU need a Constitution and how can the Constitution be the roadmap to an advanced future for the EU? The answers to this question can be found by analyzing several directions (these are the main points of the article): historical reflexivity; socio-cultural analysis of the philosophical concepts of well-known political and social philosophers such as Immanuel Kant, John Locke; the modern constellation through the prism of Jürgen Habermas and the decision to make a text as a Constitution which its aim is to reach the starting point of an entire community like the EU.

Keywords: *constitution, EU, philosophy, law, John Locke, Immanuel Kant, Jurgen Habermas*

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“Without man and his potential for moral progress, the whole of reality would be a mere wilderness, a thing in vain, and have no final purpose.”
Immanuel Kant, *Perpetual Peace*

Introduction

The article analyzes the feasibility and necessity of an EU Constitution. Briefly, the history of the draft constitution is as follows: The draft treaty aims to codify the two main treaties of the European Union - the Treaty of Rome of 1957 and the Treaty of Maastricht of 1992, as amended by the Treaty of Amsterdam (1997) and the Treaty of Nice (2001). The debate on the future of Europe is believed to have begun with a speech by German Foreign Minister Joschka Fischer in Berlin in 2000. The process began after the Laeken Declaration, when the European Convention was set up, chaired by former French President Valerie Giscard d’Estaing, with the aim of drafting a constitution. The draft contract was published in July 2003. After lengthy discussions and debates over the proposal for qualified majority voting, the final text was approved in June 2004 and signed by representatives of the Member States on 29 October 2004. The failure of the treaty in France and the Netherlands is a serious blow to the European Union because these two countries are considered to be loyal supporters of the European project. The text of the treaty was subsequently rewritten by the Amato Group, officially the Active Committee on European Democracy (ACED), a group of high-ranking European politicians. During the German presidency of the Union, a new treaty was proposed - the Treaty of Lisbon - to replace the original draft Constitution. On 12 June 2008, the Lisbon Treaty was also rejected in a referendum in Ireland. But let’s look beyond history. Why does the EU need a Constitution and how can the Constitution be the roadmap to a progressive future for the EU? The answers to this question can be found through analysis in several directions (these are the main points of the article): historical reflexivity; socio-cultural analysis of the philosophical concepts of philosophers such as Immanuel Kant, John Locke and Thomas Jefferson the modern constellation through the prism of Jürgen Habermas and the decision to make a text as a Constitution the starting point of an entire community like the EU.

John Locke

In his book “Two treatises of Government” (see Locke 1823), John Locke introduced the concept of “political compact”, which he believed to be an agreement between the people, the monarch and the legislature, so that with the power given to them, rulers should take care for the protection of the legal and inalienable rights of citizens.

This power is not absolute and eternal, but only so far and so long as to achieve the given end (see Locke 1823). So, J. Locke laid out basic constitutional principles that were enthusiastically embraced by the workers of the American Revolution. Boris Manov, the Dean of the Political Science department in South-

West University of Bulgaria, wrote that “Locke is the first author in the history of European philosophical thinking, who specifically addresses the issue of the tolerance in human relations, and because the ideas he develops lie at the basis of all further theoretical interpretations and political documents related to the justification and practical implementation of the principles of tolerance in the life of society – between individuals and social groups, between different religious, political, cultural, ethnic and other organizations and institutions within countries and in relations between countries internationally, including to this day” (Manov 2010, p. 58).

Immanuel Kant

Immanuel Kant published the article “Idea for a Universal History from a Cosmopolitan Point of View” –in November 1784. The article itself points to the nascent idea of forming a civil society that itself belongs to something larger - a community with values and identity. This issue appeared as an answer to a questions raised in the course of a conversation with “a scientist” (Teoharov and Koleva 2003, p. 3), during a Kantian journey. In the “Brief Notice” of the newspaper (Gothaische Gelehrte Zeitungen) in which Kant published this article of his in response, it was said: “The favorite idea of Mr. Prof. Kant is that the ultimate goal of the human race is the attainment of the most perfect polity, and he desires that a philosophical writer on matters of history should undertake to present to us in this respect a history of mankind, and to show us how far, in different ages, mankind has approached this ultimate goal, or distance themselves away from it, and what he will have to do to achieve it.” (Teoharov and Koleva 2003, p. 3).

In response to the note in the newspaper, as well as to the questions that arose during the conversation of Im. Kant with the “scientist”, Im. Kant presents his theses on the topic: “Idea for a Universal History from a Cosmopolitan Point of View”, in nine propositions.

In the desire to understand in what way Im. Kant tries to formulate his theses about the cosmopolitanism of history. How does he manage to present his ideas about the regular play of nature with history.

In the “Fifth thesis” Im. Kant writes: “The greatest problem for the human race, with the idea of solution that Nature drives man, is the achievement of a universal civic society which administers law among men. The highest purpose of Nature, which is the development of all the capacities which can be achieved by mankind, is attainable only in society, and specifically in the society with the greatest freedom. Such a society is one in which there is mutual opposition among the members, together with the most exact definition of freedom. Meaning, fixing its limits so that it may be consistent with the freedom of others. Nature demands that humankind should itself achieve this goal like all its other destined goals. Thus, a society in which freedom under external laws is associated in the highest degree with irresistible power, i.e., with a perfectly just civic constitution, is the highest problem Nature assigns to the human race; In Nature, need forces men, so

enamored otherwise of their boundless freedom, into this state of constraint. They are forced to it by the greatest of all needs, a need they themselves occasion in as much as their passions keep them from living long together in a wild freedom. Once in such a preservation of civic union, these same passions subsequently take humans to the best direction possible. It is just the same with trees in a forest: each need combines with the others. Since each tree in seeking to take the air and sunlight from the others must strive upward, each realizes the need to create a beautiful, straight stature. While those that live in isolated freedom put out branches at random and grow stunted, crooked, and twisted. In this context, Kant wrote: “All culture and art that adorn humanity, and the most beautiful social order, are fruits of unsociability, which is compelled by itself to discipline itself, and thus, by an art extorted from it, to develop completely the germs of nature” (see Kant 1784). These words of Kant could serve as prolegomena to a manifestation of man’s striving for universality, cosmopolitanism and globalism.

In the “Seventh”, “Eighth” and “Ninth thesis”, Kant wrote: “The problem of establishing a perfect civic constitution is dependent upon the problem of a lawful external relation among states and cannot be solved” (see Kant 1784). On the face of it, it is strange to wish to write a history in accordance with an Idea of how the course of the world must be if it leads to a certain rational ends. Nevertheless, if one may assume that Nature, even with the idea of human freedom, works not without a plan or a purpose, this Idea could still be of use. Why? Because even if we are too blind to see the secret mechanism that shows how the world works, this Idea may still serve as a guiding thread for presenting as a system, at least in the broad outlines, tries to show what otherwise a planless conglomeration of human actions would look like. For if one starts to examine Greek history, through which every older or contemporaneous history has been handed down or at least certified; if one follows the influence of Greek history on the construction and misconstruction of the Roman state which swallowed up the Greek, and the Roman influence on the barbarians who in turn destroyed it, and so on down to our times; if one adds episodes from the national histories of other peoples in so far as they are known from the history of the enlightened nations, one will discover a regular progressive process in the constitution of states on the European continent (which will probably give the laws, eventually, to all the others). Furthermore, it is important that one should examine the civic constitutions and their laws regarding the relations among the European states through the good purpose they served over long periods of time to elevate and adorn nations and their arts and sciences, while also examining the consequences of destroying them.

According to Kant, if only a germ of enlightenment were to remain for its further development, a guiding thread would be revealed. It can serve both to elucidate the confused play of human needs, and to the art of prophesying later political changes (a use already made in history even when viewed as the detached effect of lawless freedom). In addition it can also serve as a comforting glimpse of the future (which could not reasonably be hoped for without the premise of a natural plan) in which it will be shown how the human race finally achieves the state where all the seeds planted in it by nature can fully develop and where its destiny can be fulfilled. The race is here on earth.

In this regards, Kant wrote: “They will naturally value the history of earlier times, from which the documents may long since have disappeared, only from the point of view of what interests them, i.e., in answer to the question of what the various nations and governments have contributed to the goal of world citizenship, and what they have done to damage it. To consider this, so as to direct the ambitions of sovereigns and their agents to the only means by which their fame can be spread to later ages: this can be a minor motive for attempting such a philosophical history.” (see Kant 1784).

On the face of it, it does seem like a very complicated idea. Among other things because it is based on the scientific experience that existed in Kant’s time. Kant writes how the course of a historical world process will look, which will be subject and guided by nature, but at the same time subject to a priori probability that is implied by itself during its development. However, Kant believes that there is no doubt that man’s part in this world-historical process is: “to imply a cosmopolitan universality and to remind us of what “nations and governments” have conquered and achieved from a “world-civil point of view” (Im. Kant’s expression).

Im. Kant introduced another key concept that is relevant to this very day – “rule of law”, which means free access of all members of society to government, and limited power of the state to prevent its arbitrariness. Only after the establishment of this principle can one move to liberal democracy. Kant made these conclusions after examining the constitutions in the USA and France at the end of the eighteenth century.

Tatyana Petkova, a professor in the Political Science department in South-West University of Bulgaria, writes: “How to live with the Other without any problems or contradictions? How does someone accept the Other – its religion, customs, culture without problems, and conflicts? Of course, the most tolerant is living on either side of a clearly marked line. On its core, the idea of tolerance in both John Locke and Immanuel Kant is to be able to accept the Other as who he is. This process works for the idea of a globalizing world and all the challenges that arise from this process that lead to the demolition of many of the boundaries typical of traditional societies, but also lead to the destruction of borders to the dangers of compelling modern human, placing him in a situation, living in a society labeled with a global risk. It is fair to assume that the idea that people living in a European community (and/or the greater part of the world), today after two world wars and a gradual global liberal democracy, are reasonable enough to exit by any human logic. Today we are constantly talking about pluralistic social spaces, civil society and modern democracies. However, we often forget that in 1933 Adolf Hitler came to power, precisely through democratic elections. Today, we see factors, ideological waves and political factions, pushing for sharp manifestations of antisemitism, xenophobia, chauvinism, racism, sociopathism, etc. Tolerance – it is today one of the most problematic themes.” (Petkova 2019, pp. 23–24).

Jürgen Habermas

Is the “European idea of unity” put to the test today? The war in Ukraine, the ongoing economic crisis - the unstable economies in the EU, the indifference of civil society and the often populist reactive political elites allow the failure of the European project to appear today as a real looming threat.

Habermas, in the spirit of the classical philosophical tradition, makes sense of the present by defending Europe from the rising wave of skepticism, opposing it with a new narrative about the history and future of the European Union. As well as for the horizons before all humanity.

Habermas proposes an approach/method for the transnationalization of democracy. He presents the process of European unification as an interaction of legalizing and civilizing state power.

Moreover, Habermas appeals to politicians to replace the type of “European project” distant from each of its citizens, which is currently managed by elites and behind “closed doors”, with the informal mode of a noisy argumentative battle of opinions in the general public.

As an alternative to this, Habermas proposes (RE) a constitution for Europe. An important element in this context of rights and duties in the spirit of a constitution is the concept of human dignity, as well as federal democracy and international law, which would be a way out of the crisis of political mentality.

The concept of “human dignity” and the realist utopia of human rights (considering all the conventions and declarations on this subject) can lead to the idea that this idea of human dignity is further strained. A topic that, for example, explodes thinking about “human dignity” is the topic of the “Holocaust” (Habermas 2011, p. 20), in this case, we have a complete disregard for human rights and human dignity. Habermas writes “It is only through this internal dependence between human dignity and human rights that explosive connection of morality with law arises, with the mediation of which the constitution of a just political order... guaranteeing legal freedoms can be undertaken” (Habermas 2011, pp. 52–53).

Habermas asks a rhetorical question “Why is Europe today more than ever a constitutional project?” (Habermas’s text is from 2011, but it is highly relevant today). His answer is: “Transnationalization of popular sovereignty is possible in the form of a democratic union of nation-states. On the one hand, nation-states are subject to supranational authority, on the other hand, a community of citizens of the Union shares constitutionally the constituent power with a limited number of ‘constitutional constituent’ states who have been mandated by their peoples to assist in the founding of a supra-national community. If we look at the development of the European Union from these two points of view, the path to a politically capable and democratically legitimate Europe (at the core) is by no means blocked. Precisely because the longest stretch of this road has already been crossed with the Treaty of Lisbon. The civilizing role of European unification acquires validity just now, in the light of a cosmopolitanism of a much larger scope.” (Habermas 2011, pp. 66–67).

The question arises: What path of further consolidation will the EU choose in view of its current status as a politico-economic union of states – a transnational community of democracies or a federal democracy?

The answer to such a question by Habermas is multi-layered, considering that the EU is a community of nation-states that bear their own sovereignty, and they would hardly lose it.

Europe as a continent is the birthplace of the nation-state, in most cases each of these states has its own national language. The expectation that such a sense of national belonging will evaporate against the background of global processes is exaggerated and unjustified. That is why we talk about elements of the local in the global glocalization, for example, languages.

The possibility, under the influence of the free market and the economic cooperation in the EU, the transnational economic and political parameters between the countries, to create a feeling of cosmopolitanism on a mental level in the people living in the European community is great.

However, the extent to which the EU is ready to transform itself from an international organization into a federation is a question with a complex answer.

The bet that was placed in the creation of the European Coal and Steel Community was this - that one day the peoples of Europe would be united in one state, but the path for many of the countries in Europe and in the EU to such a federated existence will be difficult, most - already in terms of purely economic indicators - the gap between the economies of “Western Europe” and the economies of the former socialist countries in the east is still very large.

The idea of an EU Constitution is the first and decisive step toward a federation. Unfortunately, the draft Constitution did not materialize, but it is important that the first attempts for its existence were made - the general constitution for a federation is the most important legal moment that legitimizes its existence

“The European Union will be able to stabilize itself in the long term if it takes the steps imposed by the compulsion of economic imperatives in the direction of coordinating the relevant policies not in the usual governor-bureaucratic style, but on the path of sufficiently democratic legalization. But as we take our next constitutional-political steps, we will be stuck in the mud if we continue to navigate the conceptual spectrum between confederation and federal state, or if we are content to deny that alternative in some vague way. Before we can recognize what European decisions currently lack in terms of legitimacy, we must appreciate the democratic quality of the form that the European Union has already adopted with the Treaty of Lisbon” (Habermas 2011, p. 78).

Habermas has in mind that the Treaty of Lisbon originates from a constitutional project from the end of 2001 (Declaration of the European Council on the future of the European Union, or Laeken Declaration) (see Laeken Declaration 2007), on which progress was made in 2002 and 2003 d. within the framework of the European Convention, which drew up the Treaty establishing a Constitution for Europe (see The European Constitution 2005).

The process leading to the Treaty of Lisbon was the result of negative results in two referendums on the Constitutional Treaty in May and June 2005, in response to which the European Council decided on a two-year “reflection period”.

Finally, on the basis of the Berlin Declaration of March 2007, the European Council held on 21-23 June 2007 adopted a detailed mandate for a follow-up intergovernmental conference during the Portuguese Presidency. The Intergovernmental Conference concluded its work in October 2007. The Treaty was signed during the Lisbon European Council on December 13, 2007, and ratified by all member states. The Treaty establishing the European Community has been renamed the “Treaty on the Functioning of the European Union” (see TFEU 1957), and the term “Community” throughout the text has been replaced by the term “Union”.

The Union takes the place of the Community and is its successor. The Treaty of Lisbon does not establish symbols of the Union that are specific to a country, for example, a flag or an anthem. Although the new text can therefore no longer be called a Constitutional Treaty, it retains most of its essential achievements.

The Treaty of Lisbon does not provide for the transfer of additional exclusive powers to the Union.

However, it changes the way the Union exercises its existing powers and some new (shared) powers, increasing citizens’ participation and protection, creating a new institutional order and changing decision-making processes to achieve more efficiency and transparency. This ensures a higher level of parliamentary control and democratic accountability. Unlike the Constitutional Treaty, the Lisbon Treaty does not contain an article that formally declares the supremacy of Union law over national legislation (see Treaty of Lisbon).

Discussion: Why Does the EU Present a Constitutional Project Today More than Ever?

Today, in the EU, under the influence of all possible crises, the question “Why should we stick to the European Union at all” is often felt. This question could be answered in many ways depending on the perspective of the crisis situation. Habermas tries to give the following answer, from the point of view of a constitutionalization of international law. “Immanuel Kant goes far beyond the status quo and predicts a future cosmopolitan legal state. The European Union allows itself to be understood as a decisive step on the way to the political constitution of world society. It is true that on the torturous road to the Treaty of Lisbon, Europe-friendly ideas were ground down precisely by disputes over such constitutional-political issues, but leaving aside the constitutional-legal implications of the now-planned European economic government’, this perspective is advisable on the basis of two other reasons. On the one hand, the current debate about the immediate outcomes of the current situation of banking, currency and debt crisis has narrowed and thereby lost sight of the political dimension of the debates; on the other hand, wrong political concepts obstruct the view of the civilizing power of the democratic legalization - and with that to the promise, which from the very

beginning was connected with the European draft constitution.” (Habermas 2011, pp. 55–56).

Conclusion

The subject of this article is “Philosophy of Law or Philosophy of Reason - The idea of a Treaty establishing a Constitution for the European Union”. The subject tries to point to the conclusion that it is difficult in the European Union and in Europe in general to continue the thinking trend of fragmentation.

According to the philosophical theories presented in the article, the attempts to split/separate/split societies are a sign of historical immaturity. One point of view today, from this point of view, to claim that there are no “European examples” in Europe, that did not create a single European society, is characteristic of 19th century thinking. Multiculturalism is a fact and those who oppose globalization or those who think that this process will stop are simply wrong. In the processes of multiculturalism, society is covered from the inside, through mixed families/marriages between members of different ethnicities, different cultures, religions. Against this background, words like “nation” and “people” sound too local. Precisely because the idea of a single European community, in the spirit of universal human aspirations for a dignified co-existence, through the current European Union, has shown that there is no need for people in society to be genetically linked, their aspiration for universal human values.

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