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EUROPEAN CONSTITUTIONALISM AS THE METATHEORY OF THE CONSTRUCTION OF LEGAL AND POLITICAL REALITY AND THE CHALLENGES FOR ITS DEVELOPMENT*

Jolanta Bieliauskaitė¹, Vytautas Šlapkauskas²

Abstract

The latter European crisis reveals the fact that traditional agreements between governments of the Member States and supranational political and legal institutions of the European Union are not sufficient for the maintenance of European Union stability and integrity. Therefore, the political and legal sustainability of the European Union requires a certain metatheory as a methodology, which could essentially contribute to the coherent construction, interpretation and assessment of theoretical and practical issues of the European Union's legal and political reality. This paper aims to explore two main questions: What is constitutionalism as a legal-political metatheory? What challenges are faced by this theory while addressing the specific EU legal-political reality construction problems?

The results of the research reveal that constitutionalism as a metatheory is constituted by principles and values, which provide ideological support for the development of the nation, and performs a methodological function in the construction of legal and political reality. However, the EU's political elite still seeks to legitimize constitutionalism as a political action theory, which, accordingly, legitimizes the respective legal policies it pursues. This process dangerously increases the gap between the EU's political elite and the societies of its Member States.

Keywords

The European Union, Constitutionalism, Liberal Democracy, European Integration, Legal Metatheory

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I. Introduction

The weak management of the 2008 financial crisis in some European Union (hereinafter EU) countries and the low controllability of current geopolitical and migratory challenges has cast doubt on the prospect of the successful development of the EU as a social community. Although the EU's political elite has demonstrated the ability to make decisions in the context of a growing number of difficult challenges, they are short-term and do not pay adequate attention to EU citizens' socio-cultural identity formation and thus do not create new opportunities for the EU as a social community development. However, if the EU does not find the appropriate political and socio-cultural solutions in order to control the rapidly-increasing flow of refugees, it will inevitably have to accept the end of the Schengen Agreement. This would effectively mean the end of the development of the EU as a social community.

This complicated social situation can be considered the result of a regular democratic deficit which is, according to Grimm, determined by the poorly developed EU collective identity and weak EU citizens' trans-national discourse skills. Therefore, he rightly concludes that "the European democracy deficit is structurally determined"³. This finding is no surprise, since there have been very few political efforts to make the EU political project socio-cultural after the adoption of the Schengen Agreement.

The analysis of these new EU social conditions reveals the great consideration given to the political project of EU constitutionalisation and the lack of adequate attention being paid to the formation of a socio-cultural identity for EU citizens. However, as Ward aptly notices, "(...) the danger lies – in the assumption that the future of Europe depends upon the integrity of its political, economic, or even constitutional order, that its legitimacy can be secured by the right phraseology in the right treaty articles. Public philosophies are not found in treaty articles, and neither are constitutions. (...) It is, ultimately, a matter of belief. If Europe has a future, it must be something that Europeans believe in, not something the legitimacy of which is assigned merely by treaties and courts of law."⁴

Thus, the political and legal sustainability of the EU requires a new approach, a certain metatheory as a methodology, which could essentially contribute to the coherent construction of the European Union's legal and political reality and to the formation of the socio-cultural identity of its citizens. The authors of this paper presume that constitutionalism can be considered such a metatheory. Therefore, this paper aims to discuss two main questions: What is constitutionalism as a legal-political metatheory? What challenges are faced by this theory while addressing the specific EU legal-political reality construction problems? In order to answer these questions, the current concept of European constitutionalism is analysed and the main challenges for constitutionalism that emerge in the context of changing geopolitical and migratory contexts are discussed. The research is based on a philosophical, comparative and systemic analysis.

³ Grimm (1995, p. 282).

⁴ Ward (2001, p. 25).

II. Constitutionalism as a theory of social government

According to Sartori, if in the 19th century the term “constitution” as an overall basic agreement was definite and clear, in the 20th century, just a few decades following the First World War, this term acquired two senses: a constitution as any “state order”⁵ and constitutionalism as a specific “content of guarantees”. According to the latter sense, it becomes improper to say that every state that has a constitution is a constitutional state.⁶ The concept of constitutionalism, which has recently started to entrench in jurisprudence, is characterized by the diversity of its definitions. For instance, Walker defines constitutionalism as “the set of beliefs associated with the idea of constitutional government”, Preuss thinks, that constitutionalism is “the basic ideas, principles, and values of a polity [that] aspires to give its members a share in the government”.⁷ According to Chetvernin, constitutionalism is the theory and practice of the limitation of public governance by law, the core of which is the idea of fundamental human rights.⁸ As Friedrich states, “constitutionalism is both the practice of politics according to the “rules of the game”, which ensure effective restraints upon governmental and other political action, and the theory – explanatory and justificatory – of this practice,”⁹ etc.

Craig defines five concepts of constitutionalism,¹⁰ which can be classified conditionally into two groups: constitutionalism in a narrow sense and constitutionalism in a broad sense. According to the narrow sense, constitutionalism is a certain (descriptive) theory, which explores constitution, the content of constitutional norms (what it is and what should it be), and the relationship of the entire legal system with it. According to the broad sense, constitutionalism is understood as a culture of constitutionalism and as a metaconstitutional inquiry. The first concept is used “to connote not whether a legal system has the features of a constitution, but also the extent to which it satisfies desirable precepts of good governance which go beyond those normally expressed within the constitution itself”. The second analyses questions such as “why a constitution is legitimate, why it is authoritative and how it should be interpreted?” Here, the task of constitutionalism is to provide a rational, logical (philosophical) justification of constitutional rules which are adopted in a particular legal system.¹¹ Other scientists also provide a similar classification of the concept of constitutionalism. For example, Varlamova singles out positive and nonpositive approaches to constitutionalism. Following the first approach, constitutionalism derives from the Constitution and is specific to each state that has it, and is equated with teaching about the constitution on the doctrinal level. In this case, the content of constitutional norms does not affect the constitutionality of the constitutional act and public policy it

⁵ Sweet defines a constitution as “a specific cluster of meta-norms, those systemically-constitutive rules and principles that guide us on how all other lower-order legal norms are to be produced, applied, and interpreted”. Sweet (2009, p. 628).

⁶ Sartori (1962, p. 856).

⁷ Sweet (2009, p. 627).

⁸ Muromtsev (2014).

⁹ Friedrich (2014).

¹⁰ In legal literature the concept of constitution is classified similarly.

¹¹ Craig (2001, p. 127).

establishes. A nonpositive interpretation of constitutionalism reveals its original meaning as the system of institutional human rights guarantees and the actual alignment with the concept of the rule of law. If in fact the government is not restricted by proper constitutional constructs, there is no constitutionalism.¹²

Thus, constitutionalism can be understood as a doctrine of constitutional law, as an expression of political will,¹³ and as an overall reflective metatheory (social legal philosophy). Perceiving methodology as a cognitive theory of reality, which investigates the scientific way of thinking and principles,¹⁴ it can be said that constitutionalism as metatheory (philosophical theory) also performs a methodological function, since it investigates the constitutional (legal and political) reality, the methods and principles of its construction (i.e., constitutionalism in a narrow sense).

What principles and values compose the content of constitutionalism? Or, in other words, what principles and values allow constitutionalism to construct legal and political reality and/or to assess the current reality? O'Donoghue and many other authors state that the constitutional system, which relies on the idea of constitutionalism, is characterized by three essential features: (1) limited and accountable government, (2) adherence to the rule of law, and (3) protection of fundamental rights.¹⁵ This list of the principles and values of constitutionalism is not exhaustive. Various authors entwine the principles of liberal and direct democracy¹⁶, self-governance, populace representation, equality of all under the law¹⁷ and other principles into its content, which may have already been established in various legal documents (constitutions, international treaties, etc.) and practically realized or exist as specific (theoretical, philosophical) ideas.¹⁸

For a long time, it was customary to talk about constitutionalism in the national context, as it was commonly believed that only the state may have a constitution. However, as the analysis of international treaties and agreements indicates, the essential features (principles and values) of constitutionalism may be found on a broader than national level. Therefore, Rubinfeld talks about the international constitutionalism that has emerged over the last several decades: "On this view, it is not particularly important that a constitution be itself the product of a national participatory political process, expressing that nation's fundamental values or commitments. What is important is that a constitution must recognize human rights, protect minorities, establish rule of law, and set up democratic institutions that will remain stable for the indefinite future. If national ratification of some kind is important in this story, it is important almost instrumentally".¹⁹ Thus, European constitutionalism can

¹² Muromtsev (2014, p. 24).

¹³ See O'Donoghue (2013, p. 1021–1045).

¹⁴ Waluchow (2014).

¹⁵ O'Donoghue (2013). Also see Hashmi (2013).

¹⁶ See Elster and Slagstad (1988, p. 106); Muromtsev (2014); Hashmi (2013).

¹⁷ Muromtsev (2014). Also see O'Donoghue (2013).

¹⁸ Another question is about the sources of these principles. Are they the product of the prevailing legal consciousness and culture or only the theoretical reflection? Answers to these questions require more detailed research.

¹⁹ Rubinfeld (2002, p. 394).

also be regarded as the model of constitutionalism that goes beyond the limits of national constitutionalism.

III. The need of European constitutionalism as a metatheory of the construction of legal and political reality

Although it is presumed that constitutionalism as a state government model is based on European legal and political culture,²⁰ the words “constitution”, “constitutional” were mentioned by the Council of Europe for the first time only in the 2001 Laeken Declaration.²¹ Academic interest in European constitutionalism especially increased before the adoption of the *Treaty establishing the Constitution for Europe*. Some scientists enthusiastically agreed to the document. Others were sceptical about its ability to achieve the objectives of the EU.

Despite the fact that the *Treaty establishing the Constitution for Europe* was rejected, the EU still remains an important guarantor of the political and economic security and stability of its Member States, because, as Pernice notices, these days no state is able to guarantee the protection of freedom, peace, security and welfare of its citizens on its own: “International crime and terrorism, global trade and financial markets, climate change and unlimited communication worldwide, etc. need new structures of government”.²²

Thus, discussions of scientists held a decade ago still remain relevant. During the EU crisis and considerations of some Member States about withdrawal from the EU, the EU constitution, which establishes clear constitutional principles and values, clarifies the relationship between the institutions of the EU and Member States, identifies the EU’s main goals in areas of fundamental human rights, law and policy that could indeed be relevant and would strengthen “the EU’s normative legitimacy”.²³ However, the failure of the EU’s constitutional document in the EU Member States’ societies have shown that those scientists who have warned that, in terms of social legitimacy, the adoption of the document is not sufficient to achieve the objectives of the EU, were right.²⁴ Therefore, we strongly agree with Maduro, who states that “Until we know what we mean by constitutionalism in the European Union we will not really know what a new European Constitution will mean”.²⁵

Regarding the current state of European constitutionalism, Pernice believes that the European Constitution consists of (1) primary EU law, laid down in the Treaties on the European Union, the European Community and Euratom, (2) the precedents or law made by European judges in Luxembourg and (3) the national constitutions and the related jurisprudence of the national constitutional courts.²⁶ This approach enables the scientist to talk about a multilevel European constitutionalism model where: “The European constitution, thus,

²⁰ Muromtsev (2014, p. 37).

²¹ Brand (2004, p. 5).

²² Pernice (2001).

²³ Craig (2001, p. 147).

²⁴ See Craig (2001, p. 147).

²⁵ Maduro (2010).

²⁶ Pernice (2001).

is, one legal system, composed of two complementary constitutional layers, the European and the national, which are closely interwoven and interdependent (. . .).²⁷ In addition, as the analysis of *Treaty on European Union (Lisbon Treaty)* and *Treaty on the Functioning of the EU* reveals, these treaties establish *inter alia* the essential ideas of constitutionalism: the central position of its citizens, transparency and democratic legitimacy of its actions, the role of national parliaments, the rule of law, voluntary membership, etc.²⁸

These facts suggest that, even if European constitutionalism as a political process confronts issues of public acceptance, it remains a significant element of EU integration and identity on the legal level as far as by legal means it protects and consolidates the EU's common values²⁹, and thus it leads to a better self-understanding of the EU's political community³⁰ and coordination of common actions in order to achieve the political and economic security and stability of the EU as a supranational structure and its Member States. However, this multilevel constitutionalism emphasises the narrow sense of this concept. It essentially corresponds to that, defined by Maduro as "low intensity constitutionalism", which is not the product of a constitutional moment, but is developed step-by-step in reference to national constitutional sources, inter-governmental agreements, constitutional interpretation by the European Court of Justice in cooperation with national and supranational legal and political actors (in particular national courts and the European Commission).³¹ However, according to Maduro, this European constitutionalism lacks democracy. This is due to the fact that the authority of constitutionalism was "constantly questioned by national constitutions and dependent on the 'veto right' of national courts. It is therefore not surprising that it was, in part, a 'defensive' constitutionalism. It did not purport to reflect a social or political contract that would empower and organise the Union so as to promote a vision of the common good or, in alternative, resolve conflicts between competing visions of the common good. (. . .) Instead, it consisted more on the adoption of a series of constitutional doctrines necessary to justify and legitimise the assumption of normative and political authority by the European Communities. (. . .) these constitutional concepts did not affect the way the political process operated and how it aggregated the different interests at stake. (. . .) Community decision-making and its policies was, instead, dominated by the logic of intergovernmental bargaining among the national interests expressed by the States. Constitutionalism as a form of deliberation was left in the domain of national political communities. (. . .) Individuals were not conceived as the political actors and principals of the European Communities (. . .)".³² This kind of European constitutionalism does not cross the limits of its narrow sense.

However, this narrowly understood concept of constitutionalism had already failed by 2005. Therefore, it is necessary to return once again to the insights of Ward, Weiler, Siedentop and other authors who say that law in itself is not sufficient for the creation

²⁷ Pernice (2001).

²⁸ Pernice (2009, p. 385).

²⁹ Sweet (2009, p. 630).

³⁰ Nolte (2005, p. 4).

³¹ Maduro (2010).

³² Maduro (2010).

of a unified European Union as a political and sociocultural community: “A constitution, or at least a legitimate one, needs deeper foundations. (...) a legal elite that has far too readily basked in the illusion that the great strength of European integration lies in its much vaunted process of constitutionalisation. It does not. European integration is not strong, and without the kind of ‘moral consensus’ that can fuel a substantive political philosophy, it will not strengthen.”³³ That is why it is, in order to achieve the objectives of the EU, also very important to conceive the notion of European constitutionalism in a broad sense, i.e., as a metatheory (philosophy) of the construction and evaluation of a legal and political reality. It is clear that the moral consensus should be achieved first of all not at the institutional level (i.e. between governments and the judiciary), but at the level of the EU’s civil society and reflect the common legal consciousness and legal culture of the EU population. Recently, however, the changing geopolitical situation and sharpening issues of refugees from different cultures causes additional methodological challenges to the theory of European constitutionalism.

IV. Methodological challenges of the construction of the EU’s political and legal reality

Until the second half of the twentieth century, constitutionalism formed and developed on the grounds of classical liberalism, based on the recognition of natural human rights and the limitation of state powers. However, now this development faces methodological challenges that are changing the concept of constitutionalism or at least requires its revision. We believe that the source of these challenges is modern European legal, political and economic factors that are segregated from broader social sources.

In all cases, the EU development objective was and is a political one, which is usually implemented through the use of economic instruments.³⁴ It must be recognized that the current perception of the role of law is usually limited as help to legalize and implement policy objectives and economic measures. This situation was negatively influenced by the absolute predominance of an instrumental approach to the law specific to Western Europe in the second half of the 20th century: a modern legal system is recognized only as the mean of government’s political power, deemed to be independent from other social regulation systems, especially from moral and customs support. Therefore, Haltern quite reasonably stresses that “(...) law is ‘not just a body of rules’, but that it is ‘a social practice’, a ‘system of beliefs’ and a ‘structure of meaning’.”³⁵

The analysis of the EU development objectives, instruments and process reveals that, in the context of a collapsed communist system, the most important methodological challenge for constitutionalism is the transit of the goal of the EU political-legal reality from the defensive towards economic benefits. This transit means two things: 1) the primordial or primary goal of European integration – to avoid a new war³⁶ – has disappeared from the

³³ Ward (2001, p. 29).

³⁴ Castells (2010, p. 344).

³⁵ Haltern (2003, p. 14).

³⁶ Castells (2010, p. 344).

EU's political agenda; 2) such a change was determined by a politically naive faith that the twenty-first century was beginning with a longevous peace – a solely information and market competition era where no one raises any military threat to Western civilization. After the collapse of the communist system in Eastern Europe, the belief arose that the ideological Cold War enemy will never rise and threaten again. Such faith was formed during a period of relative calmness and the domination of neoliberalism in Western and Central Europe. Not coincidentally, the establishment of democracy and the ideal of a common market was gradually overshadowed by concepts of economic benefits in the EU's political agenda and thus economic measures turned into political purposes. This led to the corresponding political order for the development of the European constitutionalism: the increasing relevance of the concept of constitutionalism as the legitimisation of political expression that eclipsed the original idea of European constitutionalism – the limitation of powers.³⁷

The Maastricht Treaty, adopted in the context of faith in durable peace, marked not only the beginning of the EU's political, economic and legal integration process, but also the perceived political necessity to create the appropriate supra-national governance institutions that include European-level legislation and the administration of justice, legal control of national governments' decision-making and the eurotechnocratic management of general affairs. Sooner or later the limits of this management were realized – which resulted in the legalization process itself – along with the lack of the development of a collective identity and weak trans-national discourse skills of EU citizens. The political awareness of this situation actualizes the research of sources of the legitimization of supranational authority.

Therefore, the return to European constitutionalism sources is, on the one hand, an inevitable and necessary component of the EU as a social unit formation process, which probably will not be ignored by the EU's political elite. But, on the other hand, the idea of constructivism is that “a nation of citizens must not be confused with a community of fate shaped by common descent, language and history. 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”³⁸ has already been overestimated in this process. In other words, the emphasis is placed on the ideas of civil society and its submission to legal procedures, the political dissemination of which is expected to be sufficient to establish the EU not only as a political, but also a social entity.

The analysis of the functionality of these ideas in modern Western societies reveals that: 1) the trend of the development of the societies of the EU Member States is directed at the expansion of consumerism and in this context they are clearly moving away from the ideals of civil society; 2) the prevailing reliance on law is weakening. This is especially notable in social groups of politicians and businessmen. This can be illustrated by the financial

³⁷ Maduro (2010).

³⁸ Habermas (2001, p. 16).

and economic crisis of the EU Member States in 2008, the deep source of which is the crisis of law observance: “(. . .) the EU’s response to the crisis of the eurozone cannot be understood (. . .) without adding the dimension of domestic politics, previously often ignored due to the absence of public interest in the EU”.³⁹ We find an exceptionally long and therefore especially profound crisis in modern law in Greek society.

Therefore, from the methodological point of view, it is completely inefficient to contrast essentialism, which states that Europe has no *demos*, which is defined in ethno-cultural and organic terms and is the source of democracy and legal power⁴⁰, with constructivism, which “inverts the logic of the no *demos* thesis by claiming that legal norms can also produce identity and that the conceptual sequence standing opposite to that of the no *demos* thesis can also apply: first a state/constitution, then a people”.⁴¹ There is a classic statement in the theory of the state: it is not only a nation that builds its state, but also a political elite can create a nation on the basis of public resources. An example of the second part of this classic statement is the United States, which has applied the foundation of classical liberalism – social contract theory: the political legitimacy of the government arises only from the consent of the ruled and exists only to protect human rights. Thus, constructivism needs the initial assistance of *demos*. Therefore, from a methodological point of view, it is very important to thoroughly explore the heritage of the nurturing of social order and justice in European societies and law archetypes, which are common to most countries.

It is also necessary to discuss the relationship between constitutionalism and multiculturalism, which has so far been insufficiently examined. This relationship is generally blurred by the third element – pluralism, which states that, in reality, there are several approaches to the same phenomena, which are independent from each other, contradict or reject each other. We cannot avoid the conflict of real-world interpretations, because this is presupposed by different lifestyles of people. In this sense, pluralism is the recognition of an already existent relationship. But that does not mean that the real community tolerates absolute pluralism. Typically, communities seek to avoid it by giving pluralism a normative dimension according to which it is possible to extract rules and methods for the resolution of conflicts, which arise from different theoretical cognitive interpretations. As a result, absolute pluralism becomes a relative pluralism.

The European geographical space has never been homogeneous from the historical and civilizational-cultural point of view. According to Wandycz, there was no division between the East and West in the mentality of contemporaries. He argues that this division appeared only in the 19th century.⁴² Later, a dualistic conception of the European past established itself, based on the cultural-religious division. The Christian civilization arose in the ruins of the Western Roman Empire. It was shaped by the Greek and Roman heritage, customs of the Germanic people and the traditions of Christianity itself. Namely, Christianity laid the foundations for the Western concept of diversity and the coexistence of different cultures.

³⁹ Vilpišauskas (2013, p. 361–373).

⁴⁰ Grimm (1995, p. 282).

⁴¹ Lindahl (2003, p. 438).

⁴² Wandycz (1992, p. 1–7).

This Christian context determined the formation of relative pluralism in Europe and the culture of different communities living together. Therefore, it is absolutely no coincidence that classical liberalism is formed as a philosophical actualization of relative pluralism: constitutionalism ideologically guarantees relative pluralism within the limits of the respect for human rights and obedience to the modern legal system.

Multiculturalism is a political project of governments of the second half of the twentieth century Western European states that have replaced the previously existing inclusive policy of “unity in diversity” with the cultural diversity policy. In practice, this means that the state gives permission to immigrants from other cultures to live according to their customs and assumes the legal obligation to financially endow those individuals to live above the poverty line. Thus, during the palmy days of the Western European welfare state, the policy of cultural diversity policy has enabled the unfettered spread of the cultural autonomy of Muslim groups, which inevitably demanded political correctness and the promotion of the highlighted ideology of tolerance.

From the perspective of constitutionalism, it can be argued that the maintenance of the cultural human rights of particular citizens (namely, the idea of immigrants’ cultural autonomy and socioeconomic human rights) without a proper inclusion strategy may determine a cultural disjuncture, religious fanaticism and tendency towards terrorism that threatens the freedom and security of the European people.

V. Conclusion

Constitutionalism can be understood not only as a system of constitutional texts and their interpretations, or constitutional order, but also as a constitutional culture and metaconstitutional inquiry. This broadly understood concept of constitutionalism includes not only legal, but also political and philosophical components. Its core is constituted by the principles and values which maintain the idea of the restriction of governments by law and human rights.

Constitutionalism can be created at two levels: a) as a metatheory, which aims to serve the political community (the people) by means of the legitimization of the legal framework of its intellectual and emotional socio-cultural unity and provision of ideological support for the development of the nation. Constitutionalism as a metatheory also performs a methodological function, since it investigates the constitutional (legal and political) reality, the methods and principles of its construction (i.e., constitutionalism in a narrow sense); b) as a successful political action theory, which serves the political elite group and legitimizes the respective legal policies it pursues. In the latter case, there is always a high risk that the implementation of constitutionalism as a political theory without the support of a corresponding metatheory may promote not only the increased exclusion of the nation’s political elite, but also voluntaristic policy decisions, which in the long run cause harmful effects for the nation.

Constitutional analysis of the EU political-legal reality construction revealed that:

- 1) The EU is a political project which seeks to legitimize constitutionalism as a political action theory. Therefore, individual authors rightly emphasize that the elite succumbed

to the illusion that the majority of European integration strength lies in their praised constitutionalisation process.

- 2) The present constitutionalisation of different legal systems corresponds to the political project of the EU; however, it does not serve as the formation of the EU citizens' socio-cultural identity. On the contrary, this process dangerously increases the gap between the EU's political elite and the societies of its Member States, which could be fatal to the EU because of the interaction of newly evolving geopolitical and domestic political contexts.

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