
Prospects of European Integration

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**European Constitution:
A Move from the Theological Legitimation of Political Regime**

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Summary

The author's argument is that Europe must renounce Kant's universalism and adopt political means in resolving its permanently conflictual situations. In that way it is to construct its new identity that stems neither from the divergent past of its members nor from their divergent perceptions of the future, but is being built in the politically active present. The European Union as a community *sui generis* is founded on a paradox. Namely, it does not grow from its familiar historical identity, but is growing into it by permanently resolving the conflictual situations of the state of nature by political means. That paradoxical political project may be subscribed to only politically: mythologies, religions, ideologies and metaphysics would, as it were, create a state of nature but only at a higher cultural level.

Key words: Europe, Kant, political means, state of nature, universalism, Constitution



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*The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values*¹.

I.

The European Constitution is a document that does not only testify to the departure from the state as a contemporary rational construction of political community, but also from a theological legitimation of political rule through the will of people as a secularised will of God. As Carl Schmitt would say, there is no need to waste words on that any more. The word *God*, or historically over laden word *people*, are no longer mentioned in the Constitution. Traditional theory of law has remained speechless. Old concepts have become too narrow to describe current political processes, and the new so called post-modern ones are taken seriously only by a few due to their alleged chaotic nature.

Contemporary theorists of European constitutional law are facing a paradoxical question – how to build the EU as a legal-political community so that the existing pluralism of national legal and political traditions² and perpetual peace among them are preserved? Since this paradox cannot be resolved through a higher dialectical unity of opposites, because the relationships between national identities and the EU are incommensurable, *some* authors are simply sceptical toward EU as a political unity, whereas *the others* argue that European unity should be built through political relations of different entities, rather than on the Enlightenment thesis on the unity of humanity, nor through the quest for *European people* or the so called supranational cultural-historical identity in a metaphysical stylisation. We support Rawls' political argument in a broad sense.

Our argument reads: the existing pluralism of popular legal and political cultures does not obstruct European unity; it is jeopardised by the uncontrolled innovative pluralism which stems from the permanent state of nature, no matter what metaphysical or historical *a priori* have been used to restrain it. European constitutional scholars do not know how to deal with the two different pluralisms: the one that has already been cultivated, and the one still uncultivated, which resists all loyalties and all cultures since it is legally unpredictable. Substantial stability of Europe can be built only through permanent negotiations and discursive political practice as the method of a permanent departure from the state of nature. The existing divergent political cultures have been traditionally adapted to mutual cooperation.

So, the problem then is not that we use and will always use different discourses, but rather the fact that there is no discourse by which we could *a priori* control the condi-

¹ Provisional version of the formulation of the draft of European Constitutional Treaty, Brussels, June 25, 2004.

² The Greeks faced this paradox while deciding between polis and clans. Antigone is a victim of that paradox. The EU is facing a paradox: *Polis* was possible because decisions on the questions of *oikos* were not made there, but the decisions on general political issues. The contemporary EU allows decisions on economic issues, but resists from intervening into the national systems of political decision making.

tions we create through our innovative actions. We follow the rules of our special political action unconsciously, in a manner of mythical action; namely in the permanent present (we cannot act either yesterday or tomorrow). The effects of such a blind³ action are therefore uncertain, surprising and hence existentially dangerous. Uncertainty compels us to cooperate with others so we would mutually try to master the existential unpredictabilities and obscurities⁴. Such a *direct* political practice precedes European law by which it has been *a posteriori* codified. Law and politics are incommensurable forms of action. Law has a different temporal structure than politics; in relationship to politics it occurs *a posteriori*. The current European law has emerged from the relationship with European political practice and without it, it would have never been derived nor would have it been binding for anyone. Only because there is European political practice, Europe can exist in another *political* way, even with the existing *democratic deficit*, that is without democratic legitimation. Democratic legitimation of law is not identical to politics, but it is rather a special form of the manifestation of politics.

Let us now consider the views of Armin von Bogdandy, the Eurorealist, and his discussion on fundamental principles of the European Constitution.

Fundamental or the so called pre-constitutional principles of the EU Constitution are *liberty, the rule of law, democracy solidarity and loyalty*. We ask ourselves whether a contemporary European adheres to these principles blindly, that is similarly to the mythical or ritual behaviour, or in Kant's *a priori* manner, that is consciously; and if it is possible to permanently stabilise the EU on Kant's *a priori* understanding of these principles of legal and political action?

Legal scholars, whether they knew it or not, think in Kant's paradigm with a contemporary supplement that an open debate and permanent consensual process on these regulations are possible. Of course, none of the constitutional scholars believe that it is possible to establish such a level of the *substantial stability* of European political institutions as it exists in nation-states. What needs to be regulated with the Constitution is the existing normative chaos (*constitutional chaos*) as it was referred to by D. Curtin. Such a chaotic contradictory state generates distrust in the competences of European institutions, which only causes unforeseeable difficulties in political and legal actions. The debate on the principles of the European primary law is expected to establish order in this chaos and obscurity, and it will prove its efficiency through establishing a higher level of transparency in the relationships of power and competences between the EU and its members.

In this way the debate on the principles would provide its legal contribution to the creation of *European constitutional identity* and, prospectively, to the creation of European *demos*. At any rate, the European Constitution is born in the constitutional space of European national constitutions and so the national constitutions appear as constitutions in general normative context (Bogdandy, 2003: 157).

³ Rawls uses the term the *veil of ignorance*.

⁴ See: Habermas, 1985. Wittgenstein sees it differently: Does a cat know it is catching a mouse? It follows the rule unconsciously. The absolute cat should, according to Hegel, know why it is catching a mouse!

As analysts and normativists, legal scholars know that the European Constitution is a *constitution of detail*. This peculiarity is, according to Bogdandy, an expression of distrust of the Member States toward those contents of the European Constitution, which would encroach upon sensitive issues of the source of actual power of political elites of the Member States. Naturally, the Union does not have a single source of power because it shares political power with the nation-states. The question is only how to arrange the relationship among the national and ruling elites of the European Union, namely, how to determine and control the sources of their political power: democratically, legally or in some other way? In nation-states the power is legitimized and controlled *democratically*, in the EU predominantly *legally*. Thus, in the EU there are *two* levels of control and legitimation of power simultaneously at work: *democratic* and *legal*. In addition, the heterogeneous national constitutions of 25 members cannot be projected in the Constitution of Europe as under some common denominator. The European Constitution must have a different legitimation and a different structure from individual national constitutions and even from all of them together; it has to be something else, and not the constitution of a superstate nobody even wants.

The European Union is not a traditional political unity; it presupposes the exercise of power by various actors. Being aware of that, G. Frankenberg has reactivated the old contractual theories in order to explain the current state the EU has found itself in (Frankenberg, 2001: 39). He suggests contractual solving of political problems and contractual legitimation of the Union. Instead of a democratic source and legitimation of political power in nation-states, in the Union this role would be assumed by *contracts, consensus, communication, loyalty and solidarity* as *different forms* of the legitimation and control of supranational institutions of political power. These different legitimation processes are taking place simultaneously and therefore are not in any causal or theological relation. *Democracy*, on one hand, and *contracts, consensus, communication and loyalty*, on the other, are mutually incommensurable forms of action and legitimation. This principle incongruence of legitimation methods testifies that in modern Europe two different political orders exist simultaneously: the European and that of the Union's Member States.

What pre-constitutional political motives make this parallelism possible? *We preliminary claim – the state of nature which exists simultaneously in both systems: in the system of the Union and in the Member States*. The state of nature requires and simultaneously makes possible two-fold institutionalisation of the European demos: the internal one and the suprapstate, the European one. We wonder if this incommensurable parallelism should be bridged by traditional federative means, modelled on the constitution of the *Holy Roman Empire of the German Nation*, or by gradual creation of an overlapping constitution the national constitutions gradually flow into, thus becoming amalgamated in or with it. Habermas has contemplated this alternative at a deeper level when in *Faktizität und Geltung* he did not have in mind only a communicative amalgamation of national constitutions and the European Constitution, but the *symbiosis* of the state of nature and political order.

If we bear in mind the existence of various political communities parallel to the European one, then the discussion on pre-constitutional principles of the European Constitution represents the search for the minimal nonbinding principled symbiosis or

amalgamation of these incommensurable political realities. This process represents the search for a substitute for Hegel's dialectical overcoming of these incommensurable opposites at the higher speculative unity.

II.

It is apparent that the four mentioned pre-constitutional principles correspond to fundamental requirements of Kant's social contract. The impression is intensified when Bogdandy, using Kantian vocabulary, lists the open questions of supranational federation *sui generis*, and these are, according to him, the relationships between unity and plurality, centre and periphery, the whole and its parts, organism and its limbs, higher and lower levels, connections and the connected. All these relationships can be, without further ado, rationally resolved within Kant's transcendental project, which does not differentiate theory from practice (Kant, 2000). By observing the dysfunction of these concepts, which is based on the analysis of the material, Bogdandy demonstrates in a counterfactual way that the unity of theory and practice on which Kant builds his conception of perpetual peace does not work. From the position of his or her own selective blindness, a pragmatist does not notice the question why it does not work. However, a conscientious pragmatist in his or her analyses of the material nonetheless reveals cases, which do not fit into the method of his or her analysis.

Due to a dual legitimation base, the European Constitution, modelled on the unity of differences, should integrate, dialectically or at least pragmatically, in it national constitutions and thus lead the systemic, or dialectical and democratic or practical principle up to the process of their gradual integration. Of course, this dialectical figure has been renounced by the argument that Europe is not a process of approaching a beforehand-defined goal and *telos*, namely, a complete political integration in which the existing differences among divergent members are being lost.

Instead of a complete integration, now *structural compatibility* between the EU and heterogeneous nation-states whose heterogeneity only increases with new members, is on the table. Achieving structural compatibility in the current situation is the task (Bogdandy, 2003: 189), which requires a maximal political engagement, loyalty and solidarity of all the Union's members. Given the voluntary character of the Union's membership, scholars realise that even a creeping constitutional homogenisation might be interrupted at any moment by an autonomous step of any member. Instead of homogenisation and integration, the term used everywhere is structural compatibility, which is certainly an expression of legal appreciation of the relationship between the incommensurable concepts. Incommensurable constitutional and traditional projects can be alleviated only practically, in the same way as the lack of mutual understanding between members of two different languages can be bridged by pantomime. With factual plurality of national constitutions, the EU, as a legal and political community, can be developed only through political practice, and not through *a priori* constitutional models, not even when they have been democratically harmonised. In conflictual situations a constitutional identity of the divergent members that can always withdraw from the agreement they had previously accepted can be preserved only in this way.

Aside from the incongruence between the national constitutions and the European Constitution and other European treaties, Bogdandy asserts that the intrusion of European supranational legislation into national legislations is so enormous, that it gives rise to centripetal forces, which aim to develop numerous mechanisms for the protection of national identities (193).

III.

The problems of protecting national political identities emerged when unified Union regulations started to be operative, or started to be concretised in the nation-states. Is it, however, possible to overcome the disharmony between national legislations with the EU legislations by legal discourse, or should these processes of mutual adjustment between two or more legal traditions be left to the practice of political action?

Protecting the differences, which are safeguarded by the Council of Europe, no matter if this is done by democratic or communicative political means, is the condition for the members' equality and with that a presupposition of the universally acceptable legitimisation of the supranational rule. If the Union is not to be the means of hegemonic aspirations of any state, or of European bureaucracy and technocracy, then the institutional means against such tendencies must exist.

In addition to all that, the substantial stability of the EU, in our opinion, cannot be expected because the heterogeneity of the community is not derived only from the plural tradition of the members but also from the innovative political action of all the individuals and all the members. In that sense the Union is an open political process, rather than a constitutionally closed system, and that is the real reason why Kant's principles of legal apriorism are non-functional and obsolete.

It turned out that the four Kant's pre-constitutional principles of integration are not operational since the members politically resist such an *a priori* integration. Pluralism is no pathology in terms of departing from the ultimate rationality, as Kant and the Enlightenment thinkers thought, but rather an inevitable *condicio humana*.

Why does Kant's thesis of universal integration of all people in Europe and on the globe not work? The reasons are not beyond our understanding. The state of nature cannot be abolished either constitutionally or in some other way, nor are there any guarantees that we will keep encountering it under constant *a priori* conditions as Kant anticipated. It is so because practical action of idiosyncratic subjects is taking place in real time in the present, *here and now*, so it is also permanently open to the state of nature which cannot be annihilated with any contract, not even with a brute force. The legal theory and pre-constitutional principles of Kant are connected to the spatial-temporal *a priori*, therefore they are valid in the perfect and in the future. In that way they are incongruent with practical action in the present, which permanently borders on the state of nature. In his book *Faktizität und Geltung*, Habermas tried to resolve the incommensurability of action and Kant's spatial-temporal apriorism with a *discursive a priori*, but in doing that he overlooked that the structure of grammatical differentiation of the past and the future, which is incommensurable with political action in the present, is also imposed upon practical action by the *discursive a priori*.

In our action, naturally, we follow our discursive projections on the past and the future; however, such an action conditioned by discourse, enables the orientation only in familiar or stylised situations. We cannot rely on such an orientation in the state of nature that we permanently touch upon in our action. Each discursive projection of action when applied disappoints the actors, because the discursive *a priori* cannot be practically realised, since theory is not identical to practice, nor can theory be imitated without a remainder by practice. If this were possible, the theory would commit violence against free practice.

The mentioned four Kant's pre-constitutional principles, with which we are to depart from the state of nature, are supported by conservative authors, although they know that they are unfeasible. Contrary to them, we should start from the argument that the state of nature is permanent so it can be resolved only practically, and not by a doctrine. The EU is not defined as a stabile legal order among European states, but as a political method of a permanent departure from the state of nature by means of practical, and not imaginary, doctrinaire or metaphysical contracts. So, the point in question is not how to constitutionally and legally overcome the existing pluralism and traditional differences among the Union's members, but rather how to practically preserve the differences from threatening uncertainties of the state of nature, as well as from doctrinaire levelling, homogenisations and integrations, since these are the dangers which constantly influence European politics.

It is this paradoxical status of the community *sui generis* that we have to play ourselves in. It should by no means be forgotten that existing differences among traditions also emerged through the innovative action of the members, through which different national entities have been historically shaped. Overcoming these long-known historical differences among European states is unproductive. What has already happened, can neither be recalled, nor declared non-existent. Those differences among the Union's members, which permanently arise in connection with the state of nature, *here and now*, must be resolved politically.

Europe must free itself from Kant's universalism, the Enlightenment cosmopolitanism and *ontological apriorism*, on the basis of which it is already known, in advance, with astronomic precision, when and how something will happen. It has to preserve its capacity to resolve those conflictual situations, which it permanently produces here and now, by political means. In that way it constructs its new identity that stems neither from the divergent past of its members nor from their divergent perceptions of the future, but is being built in the politically active present. The European Union as a community *sui generis* is founded on a paradox: *It does not grow from its familiar historical identity, but is growing into it by permanently resolving the conflictual situations of the state of nature by political means.* That paradoxical political project may be subscribed to only politically: mythologies, religions, ideologies and metaphysics would, as it were, only recreate the state of nature at a higher cultural level.

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