

What Type Of Constitution EU Needs? An Analysis of the Constitutionalization Problems Within The European Union

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Abstract

This article examines constitutional activities within the European Union since its establishment as European Coal and Steel Community and different perspectives on how the EU would increase its legitimacy through a constitution. After the amendment of the old Constitutional Treaty of Rome with the Treaty of Lisbon, which entered into force on 1 December 2009, it seems that EU still needs more solid ground for a stable future from the aspect of judicial, economic and social challenges. Detailed analysis on the European Constitution is made by paying a special attention to the opinion of the representative of Critical Theory Jürgen Habermas and those who comment on his pro-constitutional attitude. Current debt crisis revealed the lack of closer cooperation regarding the economic policies and the lack of fiscal union among the EU members. EU is still having problems to adjust its system into parliamentary democracy with a failed attempt to create a single constitution for a divided Europe. The Treaty of Lisbon could be regarded as a transition document that would answer immediate needs. However, considering contemporary problems within the EU, it is still far from accomplishing the eventual target of the European Union.

Keywords: *European Constitution, European Integration, European Union, Critical Theory, Constitutionalization*

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Avrupa Birliđi'nin Nasıl Bir Anayasaya İhtiyacı Var? Avrupa Birliđi'ndeki Anayasalařma Sorunlarının Deđerlendirilmesi

Öz

Bu çalışmanın konusu Avrupa Kömür ve Çelik Topluluđu'nun kuruluşunu takip eden süreç sonrası gerçekleştirilen Avrupa Anayasası çalışmalarıdır. Avrupa bütünleşmesinin nihai hedefi olarak gösterilen Avrupa Anayasası'nın reddedilmesi ile yeni ve farklı bir sürece girilmiştir. Makale içerik itibariyle Avrupa Birliđi kurumlarının meşruiyetlerini artırma amaçlarına yönelik olarak gerçekleřtirdikleri reformları ve bunların siyasi yönlerini incelemektedir. Bu amaçla eleřtirel kuramın temsilcilerinden Jürgen Habermas'ın ve kendisine karşıt görüşte olanların tartışmalarına yer verilerek Avrupa kurumlarının meşruiyet arayışları ve yapılacak olası bir anayasanın farklı yönlerine değinilmiştir. Avrupa Anayasası onaylanmamış olsa da onun yerine kabul edilen Lizbon Antlaşması geçici olarak kabul edilmiş bir uzlaşma metni olmuştur. Bu bağlamda Avrupa'daki ekonomik kriz sonrası oluşan hava ve kurumların faaliyetlerinin yeniden gözden geçirilmesi, yeni bir oluşumun gerekliliđini ortaya koymuştur. Anayasa'nın oluşturulmasında dikkat edilmesi gereken konular ve Avrupa'daki çok kültürlülüđe yanıt verebilecek bir metnin oluşabilmesi için izlenebilecek metod tartışılmıştır. Avrupa Birliđi kurumlarında ve de özellikle Komisyon ve Konsey'in uygulamalarının akademisyenler tarafından eleřtirilmesi yeni bir yapılanma sürecinin yolunu açmıştır.

Anahtar kelimeler: *Avrupa Anayasası, Avrupa Bütünleşmesi, Avrupa Birliđi, Eleřtirel Kuram, Anayasalařma*

Introduction

The word constitution finds its bases from the word *constituo*, which means creation in Latin language. Today countries' powers is stemming from their nation through which a constitution shows that the source of sovereignty is the nation. As every country has its own constitution, the main aim to do it is to restrict political authority and to enlarge the activity area of an individual. Being accepted as main norm, all other arrangements must be appropriate with the constitutional rules. Although superiority and binding characteristics of the constitutions have been accepted with the first two written examples (1787 US and 1791 French constitutions), the dependence of other rules to judgement according to the constitutional appropriateness have been accepted later (Yazıcı, 2005, p. 82).

Constitution is a reflector of historical and cultural characteristics of a nation and if we use the concept "European Constitution", it will cause some different understandings. One reason for this is the consciousness that there is a community behind this concept. Hence, as an organization created on the fact of diversity of cultures, the EU as its most important project,

tried to reflect its historical and cultural characteristics in to this constitution not only from its member states but all European countries. There was a similar attempt with the first Constitutional Treaty in Rome. However, its ratification process was blocked after the negative results of referenda in France and the Netherlands. The Lisbon Treaty was invented as the new “softer” form of the European Union; something that can be transition process to a federal structure in the future. Closer institutional cooperation was envisaged for the EU institutions in order to keep the EU 27 running. Creation of the European External Action Service was the positive outcome of the Treaty of Lisbon. The European Union has been accepted as an institution that protects European interests and contributes to the democratization of the Balkans, Caucasus and the so-called neighborhood. However, the recent economic crisis showed that the economic cooperation and institutionalization were neglected which eventually blocked the decision making process regarding the anti-crisis measures. Below there is detailed overview and a discussion on how did EU perform during the attempts to create new constitution for itself and which aspects were criticized academically by scholars, and especially by Habermas who did continuously underlined the necessity of a constitution.

1. The Existence of Constitutional State Mechanisms Within the European Union

The aim of the constitutional state is to limit state authorities by the rule of law, thus to protect individual’s freedom and safety against this political authority called ‘state’. Therefore, the freedom of individual and constitutional guarantees available to protect this freedom is key elements to help distinguish what constitutional state means. The area of constitutional liberties and guarantees offered to protect them are closely related matters with the constitutional state and its institutionalization. From the aspect of European Integration, the settlement and development of the constitutional state principle is a result of double dimension development process, consisting from horizontal and vertical components. The horizontal progress of this principle is the supranational development of the Union. Indeed, Union’s supranational law system has all common characteristics of a constitutional nation state in its structure. There is hierarchy among legal principles in this supranational order like national legal systems. Therefore, treaties, agreements and additional protocols are like the constitutional documents of the Union (Yazıcı, 2005, p. 99). In accordance with these norms, all internal state regulations must answer to the criteria in these treaties, corporate records and public acts. Furthermore, constitutions of member states must be appropriate to the EU community law. The Court of Justice of the European Communities acts as constitutional courts, checks appropriateness of

national legislations with EU regulations and analyses cases regarding the inactivity of community institutions.

2. The Establishment of the European Union and Formal Constitution

The use of term “constitution” within the European Integration dates back to the establishment of the European Coal and Steel Community (ECSC). In the creation process of the ECSC, there were arguments to accept the establishing treaty as constitutional but this approach was later abandoned. In 1951, as an attachment to the ECSC treaty, German Government presented a report to the *Bundestag*, indicating that ECSC is a “European Model in Constitutional Form” which is accepted as one of the first constitutional approaches to the European Integration (Oder, 2004, p. 226). This brings in mind the European Economic Community, which was created as supranational organization. It was possible to see the term “constitution” in resolutions and initiatives of the European Parliament. In 1990, “European Constitutional Draft about the European Parliament Elements Resolution” and “Decision about the Constitutional Basis of the EU” are the main documents of the European Parliament in which the term “constitution” was used directly (Oder, 2004, p. 227). Despite the official use of the concept “parliament”, EU Parliament’s legislative power was still limited. The Commission and Council implemented large part of the legislative content. In order to add a legitimacy value, the Parliament was asked to provide opinions about the resolutions which would be accepted by the Commission and Council. Both institutions were notified about the decisions taken as a result of a vote, nevertheless, they were not in binding character and received only as recommendations. Until 2003, the European Parliament constantly tried to increase its authority and transform itself into an entity like a nation-state parliament. This situation demonstrated indirectly the need of a parliament in the process of constitutionalization of the EU, perhaps an entity *per se* which would co-ordinate all these efforts.

The Convention on the Future of Europe became effective officially on 28 February 2002 and played an important role in the preparation process of the Constitutional Treaty of Rome. Within the framework of this convention, representatives from member and candidate countries shared their opinion on the future of the European Union. On 18 July 2003, the draft of the constitution was presented to the Presidency of the European Council in Rome. Working groups played the most important role in the preparation process of the constitutional worksheet. However, Giscard D’Estaing, identified their role as assistance to the Assembly and not the one that can replace its role (Oder, 2004, p. 234-235).

3. Critical Theory, European Union and Evaluating the European Constitution

Critical theory became the center of the discussions of a European Constitution due to Habermas and his theories on how Europe could evolve into democratic entity more different from a nation state and comprises of a multi-state structure. Challenges occur while defining proper standards for such document and its peculiarities whether it will resemble a traditional constitution or something else that could change the meaning of a constitution within the EU.

3.1. The Relevance of Critical Theory

Critical theory was formed in the frame of Frankfurt School's global paradigm and particularly on the bases of Jürgen Habermas' opinions (Bostanoğlu, 1999, p. 130). Critical theory's approach to the democracy has some parallel characteristics with other traditions of critical thoughts by focusing on liberal-democratic system from the aspect of its "participatory democratic" idea. Two important elements of this critique are "liberty" and "rationality". The things understood from the liberty are political participation and opportunity to affect the government in order to form the public happiness (Köker, 1998, p. 91-92). This brings in mind non-governmental organizations and pressure groups within the EU. The individual whose rights and responsibilities are defined by the European Constitution can influence the decision making process by moving within this limit. Making a certain determination in this area will end the competition among these groups while providing more coherent position on the role of certain actors.

Instead of the "society-policy" comprehension in which people compete within the government in order to maximize their interests, Critical Political Theory puts forward the "community" concept where people come together in order to agree. In their critics over the modern community, philosophers like Gadamer, Habermas, Arendt and Rorty use the concept "community" instead of the term "society" to express the words like liberty and political power, which they have partly idealized (Köker, 1998, p. 97-99). This implies that the initial community comes together through a will and the aim to achieve a common goal. The past conflicts and violent events that Europe has experienced led to a compromise and the formation of ECSC took place in 1951. Soon after the creation of ECSC the same will fostered further integration and turned into European Economic Community. Eventual experience of living together with other communities brought the concept of deeper integration, where the "Community" turned into "Union" with the Maastricht Treaty. Those Countries that created the European Economic Community, gave part of their authority to the EU that consequently became a supranational organization.

3.2. Citizenship and Rationality

The new public was formed by infusing the consciousness of “European Citizenship” to the citizens of the member states. The elections of the European Parliament and the right to vote in local elections of another member state became examples of the formation of a European community. Furthermore, by giving the right to work and make traineeship within the Union’s institutions, citizens, obtained information on different issues like administration, international organizations etc.

Beside the concept of liberty, Critical Political Theory’s participatory democratic thought is also supported with the term “rationality”. The meaning given to the rationality in critical theory is different than that in liberal-democratic theory: *to say somebody acts rationally or to say for a hypothesis that it is rational, means that this act or this hypothesis can be criticized or defended by concerned person or persons, which means that initial person or persons are able to “establish firmly” this hypothesis.* Rationality involves communication, because something would be rational only if it satisfies conditions to be understandable by a person (Köker, 1998, p. 99-100). Therefore, it is underlined that there shall not be any limits imposed on the thoughts of an individual. This kind of system and freedom can be ensured only in states that are governed with the democracy. Eventually, this implies that liberal-democratic system places the individual ahead of everything and makes institutional regulations for human rights to preserve this space. Because of this reason, EU is against every limitation regarding to human thought and expression freedom. With the adoption of the European Constitution for the first time, Human Rights will hold a place in a constitution.

Critical theory became defender of values such as rationality and enlightenment, which put forward the superiority of human subject and are under the continuous attack of post-modern and post-structuralist approaches. Habermas defends the opinion that problems caused by the modernism can be solved not by destructing the sense so with “less sense”, but with more sense. Because of the invalidity and degeneration, rationalist criteria can be valid only according to rationalist values (Bostanoğlu, 1999, p. 144).

Wittgenstein defends that the World is organized through language or linguistic systems. As there is not objectivity except the language, words and notions, do not represent their external world. Because of this reason, the language is the infrastructure of the social life (Bostanoğlu, 1999, p. 148). The EU with being aware of this fact, accepted 22 languages as official EU languages of its 27 member states and answers petitions from these languages. By thinking that a person can understand the community and environment first with his native

language, it would create an idea how important it is to get in touch with EU institutions in a native language.

4. Does EU Need a Constitution?

Dieter Grimm is one of the leading names in the area of German Public Law. In his article published in 1995 named as “Does EU Need a Constitution”, by associating governmental constitution and national constitution perceptions he has declared that EU’s establishing treaties are not capable to replace these both terms (Grimm, 1995, p. 282). While testing the existence of the constitution, Grimm uses criteria named “constitution with its whole meaning”. This definition is concentrated on a nation and indirectly to a government. By considering the creation and changing process of the establishing treaties, Grimm, highlights the opinion that *the European Union is a result of states’ decisions and not a result of peoples’ will: as long as people are seen as the source of constitution and political authority, establishing treaties will be insufficient to cover this (constitution)* (Grimm, 1995, p. 299; Oder, 2004, p. 192). Moreover, Grimm supported his opinion that values of the democratic constitutional state can be realized only within the national framework. His concerns mostly lie on the issue that constitutionalization of the EU will create institutions, which will be self-sufficient and distant from the local population in different parts of the EU, and the member states would not be able to affect the Union with their input and change the decisions for the benefit of their citizens. Therefore, Grimm is against a European Constitution and he ignores the fact that citizens of member countries can affect the EU’s administration via referenda and electing members of the European Parliament.

Unlike Grimm, Habermas supports actions for the creation of a formal constitution within the EU. Habermas is against a constitution under the concept of nation because this brings homogeneity in the foreground. However, appropriate to his “communication theory” he believes to the benefit of a constitution, which will be helpful for the creation of a European Public, therefore, constitution is necessary not to control the structure but to form something more diverse. According to him European identity is based on diversity of nations (union of nations) and not to homogeneity. Essential part of the process is creation of equal opportunities for citizens to express their opinion regarding the things that concern them directly (Habermas, 2001, p. 15). This opportunity can be assured in an environment based on liberal-political culture where interest groups, non-governmental organizations, citizen actions and political parties at EU level can create a public opinion based on common European values. European publicity becomes more important than the public establishments at national level through the

creation of a “communication network”. Habermas believes that a formal European Constitution will contribute to the creation of “European Publicity” by enhancing the communication between nations (Oder, 2004, p. 196). By referring to the statements above it can be underlined that, continuous interaction with the European legal standards up until now, constitutions of member states became European according to the establishing treaties and hence this gave them a constitutional status.

5. Habermas and the European Constitution

In the year of 2001 in his article named as “Why Europe Needs a Constitution”, Habermas, describes that EU’s need for a constitution because of some issues closely related with the Union itself. Moreover he estimates that, EU, by using the concept “United States of Europe” will turn into an organization more than a confederation and less than a federation where sovereign countries will give their certain sovereign rights to this formation (Habermas, 2001, p. 5). Since he objects a creation of an entity like a nation state that would be hostile to other ethnicities, his principles are constructed more on the multinational structure of the new formation. This can be explained with the fact that traditional nation-state formations tend to be less tolerant to other ethnic groups and therefore Europe’s new structure should comprise a union of all different nations in Europe. Eventually, small member states could be considered as minority compared to the big member states that have larger population and influence.

Habermas thinks that the main struggle is not to create new things, but it is hard to protect the great democratic and economic achievements, which European Union managed to reach in this context. Referring to the skeptical reactions from countries like England and France concerned German attitude on acceptance of the European constitution, Habermas, interrogates the possibility for EU whether it will turn to a federation which will have some characteristics of a nation-state (Habermas, 2001, p. 6).

According to Habermas, urgent political goals and the dilemmas of previous decisions would be the most important motivation to continue the European Constitution project. There is also connection with NATO’s dominant role in European security, which creates certain complexities for the implementation of EU’s common foreign and security policy. EU’s complex decision-making process creates difficulties to coordinate the European Common Foreign and Security Policy. Therefore, the struggle for a constitution is supported by those who would like to improve the European Common Foreign and Security Policy. Nevertheless, it is accepted that some encouraging steps are taken by the EU; Persson’s, Solana’s and Patten’s initiatives during the crisis between South and North Korea can be considered as significant

achievements of the EU initiative to act as mediator in international crises. This is the proof of EU's interest to turn into a global actor in the international politics (Habermas, 2001, p. 7). Apart from being constructive in certain international problems, it is necessary to indicate that the European institutions will not be seen as serious and strong institutions by the citizens until EU does not have a military dimension (Jesien, 2002, p. 19). Because political will must be supported by military power in order to enhance EU's activity in the international politics and to be engaged more with any conflict or crisis in its immediate neighborhood.

Furthermore, EU principles such as free movement of people, capital, goods and services, can be accepted as a success of the European type economic growth in the global era. Determination of common values is required in order to pass beyond the single market integration. The negative effects of the globalization process will be restricted in Europe thanks to the economic level attained (Habermas, 2001, p. 9). With the help of its wide economic background, "European State" can benefit from economies within its structure and this will add great advantages to this state in the global competition process (Habermas, 1999, p. 58). Although the recent debt crisis in Europe proved that even united Europe is not immune from economic problems, still its unity can increase the level of resistance gradually and would make it easier to recover.

Habermas believes that the constitution of Europe will enhance the joint activities of the European States regarding an issue by passing preliminary analyses over its content and potential effects. However, it is also obvious that in order to process with the further stages of the European integration process, institutional reforms should be made as soon as possible (Habermas, 2001, p. 12-13). Here comes the most important problem whether this reform will allow more democratic institutions or a different institutionalization that will be based on the efficiency of European bureaucracy. Amsterdam Treaty made some amendments on the Maastricht Treaty. These reforms helped to foster the work of European institutions and to deepen the European integration. Both German jurists Schulz and König think that, by giving formal role to the parliament, legislation reforms within the EU blocked the decision making process by extending its process (Rittberger, 2005, p. 5). The EU Commission's role is not seen as good factor in the European governance, because of this reason, some revisions to expand Parliament's role are on the way. Nevertheless, some member states would prefer to stay within the EU only as partly integrated rather than being part of an organization that has its power invoked directly into state legislation.

6. Reconsidering the Stage of Economic Integration and the Debt Crisis in Terms of Constitutional Efforts in Europe

Now it is widely accepted that even the Treaty of Lisbon is not enough to ensure the economic integration, stability and growth in the European Union and especially within the Eurozone. European Central Bank became the core of European Monetary Policy without fiscal union and had no preparation for unexpected crises. This situation brought the discussion, which European institutions failed to prevent the crisis, and did not take necessary measures. In the beginning, Europe's reactions to the financial crisis were mostly limited thinking that this might be only an American issue (Dabrowski, 2010, p. 42). However, the crisis proved more contagious for the Eurozone countries than it was expected. It became too late to save certain countries such as Greece and Portugal. Amidst new measures taken to combat the crisis, emerged the new discussion what went wrong with the European economic integration that was thought working well. Financial crisis turned into debt crisis within the European Union where the lack of a common fiscal policy has been widely criticized. The crisis revealed the systematic weakness of European financial institutions (Dabrowski, 2010, p. 43), where the European Central Bank was in the center of every policy that dealt with rescue management. The lack of consensus among member states on the level of economic coordination, progress towards economic union and differences in social policies show that these subjects are very sensitive for the future of constitutionalization efforts within the EU (Beneyto, 2008, p. 16).

Meanwhile, with the rejection of the Constitutional Treaty, it was clear that a federal structure was also turned down. This makes necessary to discuss the issue of taxation. EU does not have the power of federal state to collect taxes nor to impose such policy on the member states. Instead, the members of Eurozone have to obey certain rules and be subject of a fiscal discipline (McGiffen, 2005, p. 167). Almost every member state stresses the necessity to achieve a fiscal union, but none has the will to step back from its authority to determine the national fiscal policy.

It is obvious that there are big problems that continue to exist and a constitution will not be enough to solve them. A constitution may only help in the operation of democratic process. As long as treaties among member states continue to exist as a fact of this political organization, European Union or (European Federal State) will differ in every kind from national federal states and would not be able to duplicate their legitimacy systems (Habermas, 1999, p. 58). The same can be argued also for the economic and social policies. Both the Constitutional Treaty and the Treaty of Lisbon did not bring many changes in this area and reproduced present *Treaty*

content without changing the existing balance between “market friendly” and “worker friendly” provisions (Piris, 2006, p. 188).

Recently national governments kept some of their rights like economic, cultural and social policies while they have transferred their monetary control to the European Central Bank, which looks like a non-political organization. Therefore, they have transferred very important tool of control. As the monetary union has completed economic integration phase (without deepening it), this increases the need to unify basic public policies.

Democratic deficiency of European institutions and particularly this within the Commission, causes dissatisfaction in some small member states like Denmark and Ireland or in some countries like Norway and Switzerland that refuse to join the EU. In fact, recent economic crisis within the EU, once again, revealed the Commission as a powerful institution by allowing it to control the economic progress or the level of debt in member countries that are part of the single currency (Bauer, Backer, 2014, p. 221-222). Moreover, the Commission also obtained the right to coordinate national policies pertaining to economic progress and development. Eventually, the Council and the Commission turned into institutions that govern the economic policy while European Central Bank became a consulting organization. Since the crisis is not yet finished, there will be new discussions on how to redesign the European integration and see if there would be another attempt for a new constitution in the future. The creation of European Stability Mechanism (ESM) demonstrated how the Council managed to strengthen its authority by proving to become more efficient than other EU institutions. Since the Council was heavily criticized of being the center of *non-democratic regulations* in the EU, it can be argued that EU’s constitutionalization efforts will have to be organized after re-arranging the power of institutions such as Commission and Council.

Conclusion

Legitimacy crisis forced EU to prepare a new constitution and search a way to unify under a proper traditional constitution. Following the enlargement waves, problems with communication occurred between European institutions and the citizens, which brought the need to seek further integration. The most viable option was the formation of a constitution in its traditional form in order to connect the multi-national structure under single umbrella. Constitution has been perceived necessary in order to control this federative structure. Scholars widely commented on how to achieve solution in the process. Being one of the most prominent representatives of the Frankfurt School, Habermas, defends the formation of a constitution mainly because of the successful outcome of European project. However, he is not in favor of

a constitution that neglects multiple ethnicities, contrary, he defends the creation of a constitution that would promote the multi-national structure of the European Union. He is also defending European constitution due to the possibility that it would allow Europe to follow more decisive foreign policy in its neighborhood. Thus, Europe would become fully engaged actor in the international politics.

After the rejection of European Constitution, the Treaty of Lisbon, has been accepted as a transition document that will lead to the deepening of European integration. However, several aspects, which were neglected in both documents, now began to create problems for the European Union. Both the timing and the flow of recent economic crisis shows that there is need for “more Europe” than before in order to re-establish the unity of the continent with more functional institutions that are based on democratic division of power. Perhaps, this would also answer Habermas’ critics on European Governance.

Financial crisis and the sovereign debt issue showed the importance of unification of fiscal policies and how it is vital for the EU to keep its economy stable in order to sustain unity. The issue whether EU’s constitution will be identical to the one in nation-states or not will depend on the input of certain countries that would take the initiative in the EU for new legislation. Giving certain duties to the European Parliament and extending its power at the expense of the Commission and the Council, is naturally seen as a way to bring more legitimacy to the European legislation. The recent financial crisis demonstrated which aspects of the integration should be strengthened more in order to prevent further division among the member states.

The Treaty of Lisbon arose in the aftermath of the rejection of European Constitution by the French and Dutch voters. Nevertheless, it is clear that moving ahead from the current point would become only possible by adopting a new document, which would create more democratic institutions that reduce the legitimacy deficit in the decisions taken.

Current flow of refugees to Europe will be another issue that European leaders need to reconsider. Failing to divide refugees among EU members and refusal of some member states to accept refugees with certain background, shows that the problem might escalate seriously. It already created certain difficulties while several EU member states halted the implementation of Schengen Agreement by trying to block the movement of refugees. The problem which was perceived more as an external issue became totally European by now. Since old treaties fail to answer contemporary challenges, it can be perceived that their revision would become necessity soon.

The constant grievances that Europe continue to face, will pave the way for further modifications of EU treaties and institution's role. Economic crisis and the issue with refugees did not only challenge the efficiency of European institutions but also their limits to prove to which extent Europe is able to implement its values. Of course, a project such as European constitution needs to obtain the approval of all circles in order to become effective and legitimate. The time will show how it will be created if the European Union continue to exist.

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