EUROPEAN CONSTITUTIONALISM AND ITS FUTURE AFTER BREXIT!

AVRUPA ANAYASALCILIĞI VE BREXIT SONRASI GELECEĞİ!

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Abstract

Constitutionalism and the EU constitution still keep their distinctive place in European Union (the EU) studies. The concept of constitutionalism has legal and institutional dimensions, which have an integrative influence over the people of the Union. It implies effective relationships within social actors so as to create social ordering and cultural ideas. For that reason, diversities and different interest actors within the Union require valid, reasonable, symbolic and normative elements such as social identity, catastrophic events, and common history, culture and religion in order to bind people together in the Union and to generate a common mental process. Yet in case of a crisis within the EU – such as identity, integration, constitution, and democratic deficit etc. – the fundamental reason for this would be the lack of constitutive element known as the raison d'être of integration. For instance, democracy deficit in the policy and law making process of the EU is regarded as one of the main issues. The citizens of the Member States have been excluded and they have been losing their interests of and support to EU policies. This is closely related to legitimacy of the constitution of the EU as well as creating common mental process. In this manner, BrExit is the historic event that all these crises and problems have obviously revealed. It divulges how EU constitutionalism fails in creating common legal and institutional dimensions. BrExit referendum is taken as a catalyser event creating huge impacts on constitutionalism and social integration of the EU. BrExit implies that preserving national sovereignty with high level of legitimacy has kept its importance over the supranational project of the Union challenging with democracy deficit, limited legitimacy, and lack of common mental process for European demos.

Keywords: Constitutionalism, the European Union, constitution, integration, legitimacy, Brexit

Özet

Anayasalcılık ve anayasanın kendisi hala Avrupa Birliği (AB) çalışmalarında önemli bir yer edinmektedir. Anayasalcılık konsepti AB vatandaşlar üzerinde entegrasyonu sağlayan bir etkisi olan yasal ve kurumsal boyutları içermektedir. Anayasalcılık kültürel fikirler ve sosyal düzenleyiş yaratan, sosyal aktörler arasında etkileyici ilişkileri kapsamaktadır. Bu nedenle, birlik vatandaşlarını birlikte tutabilmek için ve ortak bir akli süreç oluşturabilmek için, birlik içerisindeki farklı çıkar grupları ve çeşitlilikler geçerli, makul sembolik ve normatif unsurlara - sosyal kimlik, feci-yıkımsal olaylar ve ortak tarih, kültür,

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din, - ihtiyacı vardır. Fakat, AB'nin herhangi bir krizi durumunda - örneğin; kimlik, entegrasyon, anayasa, ve demokrasi açığı gibi - entegrasyonun varlık sebebi olarak bilinen kurucu unsurların eksikliği bu krizlerin temel sebep olmaktadır. Örneğin, AB politikaları ve kanunlarını yapma sürecinde demokrasi eksikliği en temel konu olarak kabul edilebilir. AB vatandaşları bu süreçlere dahil edilmemiş ve onlar AB politikalarına olan desteklerini ve ilgilerini kaybetmişlerdir. Bu durum AB anayasasının meşrutiyeti ile ve ortak akli süreç yaratma ile yakından alakalıdır. Bu bağlamda Brexit bu problemleri ve krizleri ortaya çıkaran tarihi bir olaydır. Aynı zamanda Brexit AB anayasalcılığının ortak bir yasal ve kurumsal boyut oluşturmada başarısız olduğunu ortaya koymaktadır. Brexit referandumu burada katalizör bir olay olarak kabul edilerek AB toplumsal entegrasyonu ve anayasalcılığı üzerinde çok büyük bir etkisi olmaktadır. Brexit meşru ulusal egemenliğin sınırlı toplumsal meşrutiyete sahip olan, demokratik eksiklik ile yüzleşen ve "Avrupa halkı" için sınırlı seviyede ortak akli sürece sahip olan ulus üstü bir proje olan AB ye karşı önemini hala koruduğu ortaya koymuştur.

Anahtar Kelimeler: Anayasalcılık, Avrupa Birliği, anayasa, entegrasyon, meşruiyet, Brexit

INTRODUCTION

Constitutionalism and the EU constitution have been occupying their distinctive place in European Union (the EU) studies. Constitutionalism is a troublesome issue with its many standards which have been questioned by many scholars.[1] Thus, there are various conceptions and approaches to "constitutionalism" in European studies from different points of views.[2] In the EU constitutionalism debates, context of modern nation-states has been based on pre-modern period of meanings of 'state', 'sovereignty', 'constitution', 'democracy' and *demos*, 'separation of powers', 'citizenship', 'civil society' and 'public sphere'.[3] The discussion of the EU constitution has been continued on many standard versions of the concept of constitutionalism but it has been understood by all in a way of legal and institutional dimensions.[4] In both dimensions, Grimm states that the legal norms as a constitutional level to regulate the creation and exercise of political power leads constitutions to have an integrative influence,

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[1] SHAW Jo: `The Emergence of Post national Constitutionalism in the European Union` <http://aei.pitt.edu/2385/1/002528_1.pdf> (accessed on 11.12.2017), p.4

[2] For instance, Vaicaitis disscuss "constitutionalism" with its three different dimensions; "(i) economic constitution, (ii) European human rights and (iii) European political constitution". see in Vaicaitis Vaidotas A.. 'European Constitutionalism v. Reformed Constitution for Europe' (2010), 1/119, Jurisprudence, p.71

[3] KAARLO Tuori: 'The Failure of the EU's Constitutional Project: A Cultural Discrepancy' in (Ed) Nergelius Joakim, Constitutionalism - New Challenges: European Law from a Nordic Perspective, Martinus Nijhoff Publishers, Leiden/Boston, 2008, p.108

[4] SHAW, p.4

as a result of this, it has been expected that European constitutionalism fosters the integration of the people of the Union.[5] The constitutionalism means being a part of the process of social organisation which has effective relationships within social actors so as to create social ordering and cultural ideas.[6] Diversities and different interest actors within the Union require valid, reasonable symbolic and normative elements such as social identity, common catastrophic events, and common history, culture and religion in order to hold the people of the Union together. By having this, the EU policies and legal norms have been legitimated in a broad sense. Yet, if there is a crisis within the EU – identity, integration, constitution etc. – the fundamental reason for this would be that the lack of constitutive elements known as the *raison d'être* of integration. Another main problem might be the lack of a reason why the EU citizens need to share national sovereignties with supranational institutions for more integration. Therefore, during the integration process, the citizens of the Member States have been excluded and they have been losing their interest and support of EU policies.[7] It is because the Member States have fulfilled this duty with the establishment of Treaties without asking their citizens. This reveals democracy deficit in the policy and law making process. Brexit is the historic event that all these crisis and problems have obviously revealed. It divulges that EU constitutionalism fails creating common legal and institutional dimensions. It is obvious in the Brexit referendum due to 51.9% (leave voters) of British people.

Furthermore, in this article, Grimm's idea of "integration by constitution"[8] is a point of departure to provide an analysis of EU constitutionalism with consideration of all its aspects. Grimm's approach to EU constitutionalism will be adopted as a starting point amongst many and BrExit

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[5] DIETER Grimm: `Integration by Constitution` (2005) 3 International Journal of Constitutional Law, p.194

[6] SNYDER Francis: `The Unfinished Constitution of the European Union: Principles, Process, and Culture` This paper was published by International Conference on Law and Justice in the 21st century. <http://opj.ces.uc.pt/portugues/novidds/comunica/FrancisSnyder.pdf> (accessed on 10.10.2013) p.12-3

[7] HORTENSE Goulard: 'French and Greeks like the EU even less than Brits New survey finds rising Euroskepticism in several countries', <https://www.politico.eu/article/poll-the-eu-is-bad-news-but-britain-shouldnt-leave-it/> 06/08/2016, (accessed on 28/12/2017)

[8] Grimm's points of views in this article; DIETER Grimm: `Integration by Constitution` (2005) 3 International Journal of Constitutional Law pp.193-208

referendum will be taken as a catalyser event creating huge impacts on constitutionalism and social integration of the EU. In the end, BrExit referendum will be evaluated in terms of the EU constitutionalism.

I. WHAT DOES EUROPEAN CONSTITUTIONALISM AIM?

Modern constitutions over their minimal definition of being simply the "law that establishes, empowers and regulates the main organs and levels of government and their relationships with each other" have symbolic and functional role.[9] They contain the nature and qualities of the polities, and represent the identity and expressions of popular sovereignty and their citizens.[10] In this regard, constitutionalism is composed of, as Raz defines, seven characteristics of constitution:[11] First one is the minimal definition of a constitution. Second, a constitution seeks to provide guiding principles and stability and continuity in the legal and political system. Third, constitutions give references to a canonical formulation. Fourth, constitutions are superior laws over ordinary legislation. Fifth, in the judiciary mechanism, constitutions may be interpreted and other legal acts may be tested whether they comply with the constitutions. Sixth, constitutions are rarely subject to amendments. Seventh, constitutions speak of the guiding principles and common beliefs of the polity they represent, such as democracy, legitimacy, basic political and civil rights, and pluralism and diversity. Even relative weight of these elements and their combination may vary from case to case, but they may all be taken as affirmative of the existence of constitution.[12] And constitutionalism is a process moving towards the accomplishment of those characteristics.[13] Specifically in the EU context, constitutionalism means the transformation of the EU from an international to a constitutional legal order.[14]

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[9] SCICLUNA Nicole: 'European Union Constitutionalism in Crisis', (Routledge, London&New York, 2015) p.18

[10] SCICLUNA, p.18

[11] RAZ, J. 'On the Authority and Interpretation of Constitutions: Some Preliminaries'. In Alexander, L. (ed.) 'Constitutionalism: Philosophical Foundations', Cambridge: Cambridge University Press, 2011, p.153-4

[12] RAZ, p.154

[13] SCICLUNA, p.19

[14] WEILER, J. H. H. 'The Transformation of Europe'. (1991) 100/8 The Yale Law Journal, p.2422.

In the EU constitutionalism process, not only focusing on norms is adequate but also constitutionalism and constitutional culture should be considered within a broader context.[15] It is because, if the EU seeks to remove its constitutional deficit, it is not adequate to discuss the context of EU constitution; the political process for constitution also needs to be taken into account. This kind of process requires principled argument and imaginative political psychology.[16] As a consequence of this, solution for such deficit might be that the EU constitution endeavours to establish well-built European identity and then, it can produce values for all `Europeans`, hence; this creation of identity has some similarities with the American `demos` example.[17] Then, the EU constitutionalism may have possibility to hold the people together within European identity. This identification can be used as a possibility to establish bonds between different legal and political systems due to the lack of shared meanings across the Union.[18] For this reason, the definition of the European demos is long running process.[19] Yet, constitutionalism might play an effective role, which reduces the duration of the integration process on European demos.

The debate of the European constitutionalism has been materialized by transforming the principles and institutions of national constitutions.[20] In the integration process, the EU institutions have gained sovereignty from the Member States in order to extend its power of supranational sovereignty. The EU constitutionalism has redefined the system of legal rules which establishes public power. This legal impact of the integration poses influences over not only the Member States' authorities but also the people of the Union. From Grimm`s point of view, this effect can be explained by action theory and system theory. Action theory defines that social integration is strengthened by values and norms which came into

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[15] SHAW, p.10

[16] CASTİGLİONE Dario, `Contrast and Constitutions` in Bellamy Richard ` Democracy and constitutional culture in the Union of Europe` Lothian Foundation Press, 1995, p.74

[17] HURRELMANN Achim: `European Constitutionalism and Social Integration`. Paper prepared for the Federal Trust/UACES Conference 'Towards a European Constitution', London, 1-2 July 2004, p.13

[18] GRIMM, (2005) p.208

[19] ZENON Bankoviski/EMILIOS Christodoulidis: `The European Union as an Essentially Contested Project` (1998) 4 European Law Journal, p.349

[20] HURRELMANN, (2004), p.2

existence in a socialization progression.[21] System theory implies that limitations can be enforced by different functional systems of the society; this has a determinative influence on individuals' behaviours.[22] As a result of two social integration approaches, constitutionalism influences coordination of action and cohesion of beliefs and values in society.[23] In this context, constitutionalism can make a vast contribution to social integration and establishing a common identity for a constitution. Thus, social integration and debate on constitutionalism are mutually conducted in order to hold the society together. Hurrelmann states that instrumental and symbolic mechanisms of integration bring any modern and complex society together even though it is a difficult process in practice.[24] As a result of this, the social integration requires involvement of the people into the constitutionalism process. The people of the Union should be involved into political and legal decision making process to discern and to generate these cohesion and beliefs in practice as a spontaneous process. This, most probably, strengthens the level of involvement into social integration.

The constitution means not just supremacy of law over politics but also an abbreviation of the normative catch for covering essential economic rights at the expense of rights based on other political and social values.[25] The perception of the EU constitution needs to draw its attention to social, economic and cultural contents.[26] By doing so, the constitution may cover the rights of citizens and it may produce an effect on holding the society together. If citizens of the EU have adequate protection for their fundamental rights by the constitution, then, it must have a valid reason for binding the society. The process of the EU constitution influences the integration positively; the EU has became a post national polity undertaking economic and social rights by shifting from market-oriented, intergovernmental and functional organisation.[27] In fact, Euro-

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[21] GRIMM, (2005), p.193

[22] GRIMM, (2005), p.193

[23] HURRELMANN, (2004), p.8

[24] HURRELMANN Achim: `European Democracy, the `Permissive Consensus` and the Collapse of the EU Constitution` (2007) 13 European Law Journal, p.346

[25] GERTSENBERG Oliver: `The New Europe: Part of the Problem-or part of the Solution to the Problem` (2002) 22 Oxford Journal of Legal Studies, p.564

[26] SHAW, p.4

[27] TODOSIJEVIĆ Bojan, ` Europe in Search of Legitimacy: Strategies of Legitimation Assessed` (2004) 25 International Political Science Review, and see also, BALLMY

pean integration is a form of the history of legal integration and process in order to achieve the European project despite the political controversy, different politicians and political events in the EU.[28] This legal process has been performed as a catalyser effect for social integration and accession to the benefit of the Union. By constitutionalism, the constitution plays an effective role in melting these differences in the same pot, and the integration has surpassed the legal integration to societal integration as citizens of a state.

However, in order to ease functionality of the EU institutions, constitutionalism has been confined to the *status quo* of integration and the EU constitution has became the collective state of the European institutions as defined under the minimal definition of constitution.[29] Constitutions automatically affect the social integration in a normative way, but its integrative manners are different. Social integration has been developing spontaneously in the real world not in the normative level. The integration is improved by constitution but it does not control the integration.[30] Here, it is important to say that constitutions are "a constitutive part of the community`s shared memory".[31] As a result, social integration cannot be forced by a constitution without having a common identity. A constitution requires common basis such as religion, common enemy, history, culture and nationhood, before having it.[32] The normative influence of constitution has extremely restricted effects on social integration without common mental process. The Union has its own identity policy for constitutionalism of the Union. It advertises images for the Union`s symbolic means through flag and anthem. It seems to be that establishing a constitution needs a propellant and founding power before its drafted provision and

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Richard: `The European Constitution is Dead, Long Live European Constitutionalism` (2006) 13 Constellations, p.181

[28] WARD Ian, `Beyond Constitutionalism: The Search for a European Political Imagination` (2001) 7 European Law Journal, p.26

[29] MÖLLERS Christoph: "Pouvoir Constituant – Constitution – Constitutionalism", Armin Von Bogdandy & Jürgen Bast, eds, Principles of European Constitutional Law, revised 2nd Ed, Hart Publishing / Verlag CH Beck, Oxford / München, 2011, p. 181

[30] SNYDER, p.12-3

[31] AVISHAI Margalit: `The Ethics of Memory`, (Cambridge MA: Harvard University Press, 2002), p. 12. quoted by Klabbers Jan and Leino Paivi, `Death by Constitution? The Draft Treaty Establishing a Constitution for Europe` (2003) 4 German Law Journal, p.1295

[32] SNYDER, p.12-3

constitutionalism process. By virtue of lack of common identity in the Union, holding society together seems to be difficult to fashion a constitution despite the existence of constitutionalism process. In other words, a set of questions need to be answered; as such, is the EU constitution a social contract among the people or is it an organic expression of a whole society?[33] In fact, apart from politicians, academic and administrative elites, there were no other participants to involve the constitutionalism debate in order to build the `demos` for integration.[34] The lack of participation and weak common identity are the major issues on the integration process and these should be considered in each steps of constitutionalism process.

One of the biggest obstacles for the constitution of the Union might be the existence of national identity and nationalism in the Member States. They have obstructive effects on EU constitutionalism. In order to bind the people of the Union together, constitutionalism should adopt a post-nationalist view. Then after, there would be some attempts to rethink and recover some of the vital values of nationalism; in other saying, institutional ideological weight of nation state or sense of nationalism must be compressed by soft power of the societies and the Union.[35] Constitutionalism requires a long process to establish a common identity and to persuade the people of the Union by soft power which has been implemented in the lasting process, such as transposing of EU`s Treaties to national level since the late 1950s. Furthermore, a nation state does not need to be rooted in ethnic origin; it can be rooted in other basis. The scope of social integration is depending on the democratic process which guarantees the social integration of a differentiated society. In the sense of `state-constituting people`, the democratic process tends to promote social integration in the legally abstract manner of political contribution.[36] It has caused to shape the legal institutionalisation of citizens` communication between them in recent times not in the historical cultural sense. And also, the EU has integrated economically, socially and administratively with

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[33] SHAW, p.7

[34] See the sceptical remarks of WEILER J. H. H.: 'In Defence of the Status Quo: Europe's Constitutional Sonderweg', in WEILER J. H. H./WIND M. (eds), 'European Constitutionalism Beyond the State', Cambridge University Press, 2003, p.7-8

[35] GRIMM, (2005), p.9

[36] HABERMAS Jurgen: `Remarks on Dieter Grimm`s `Does Europe Need a Constitution?` (1995) 1 European Law Journal, p.306

common cultural backgrounds over fifty years so as to overcome nationalism.[37] Yet, it can be said that social integration has been seen first time in the nation state which is a form of a politically socialising communicative context, and it depends on the satisfaction of the certain functional needs based on political self-understanding of citizens as a collective identity.[38] The post-national constitutionalism can benefit from some experiences of nation state as the first practice of social integration.

II. SOCIAL LEGITIMACY IN THE PROCESS OF EUROPEAN CONSTITUTIONALISM

Constitutional legitimacy and stability are maintained by constitutional prescription of decision making process in the economic realm and social rights which create a public area to encourage the structure of a public sphere. Changing the cohesion of beliefs should be regarded as constitutional legitimacy and stability concerns because redesigning constitutional institutions may influence personal values and identities with the purpose of guaranteeing their identifications within the polity and common society.[39] Social legitimacy has based upon achieving the creation of objectives for common identification in the constitution. Values, symbols and stances for a political leader or political unit can define citizens or can be defined by citizens. This identification leads people to extend their political participation into the constitutionalism process. Thus, the people can feel themselves as a part of constitutional ritual.[40] Democracy and constitutionalism are both essential requirements for a framework of rights, which allow political authority to function legitimately. This sort of framework assumes a personification of the community or state by interpretation of law. Likewise, theory of law exposes the great interpretation of the constitution within a certain political, legal and historical society.[41]

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[37] HABERMAS, p.307

[38] HABERMAS, p.307

[39] Constitutional integration was pointed out in the 1920s by the German legal theoretician Rudolf Smend, who in his "Integrationslehre" described a constitution as a "system of integration" that contributes to the continuous reproduction of a political community's collective identity. See also, HURRELMANN, (2004), p.9

[40] HURRELMANN, (2004), p.9

[41] WILKINSON Michael A., `Civil Society and the Re-imagination of European Constitutionalism` (2003) 9 European Law Journal, p.469

However, ethically integrated societies reconcile `freedom of the moderns` and `freedom of the ancients` in the constitution, thus, such societies tend to have strong cultural and emotional ties to statehood.[42] This commitment is one of the important difficulties for legitimacy of the EU constitutionalism, because the sense of belonging to a certain state plays an obstructive role in legitimatizing the EU constitution. It is important to highlight that the lack of legitimacy causes vital problems to the EU constitution process. Additionally, structures and institutions of national level are hidden in political and constitutional myths and cultures that are new and less unclear context in the EU.[43] Thus, the EU integration process has to face with post mythical problem of legitimacy for EU constitution. Further legitimacy deficit emerges in the integration process by exclusion of an overwhelming collective identity within societal belief system, by having no mutual recognition between the citizens, and by undercutting the citizens` political standing.[44] These even prevent the citizens to support their political institutions.[45] This deficit evokes lack of collective identity for the citizens not to recognise each other as legitimate participants in democratic decision making process.[46] It seems that such deficit weakens the integration process due to its illegitimate effect.

There are various ways to overcome such obstacles, which prevent creating a common identity within the community. For example, social rights in a constitution might extend its scale for coordination of economic sphere and then, social rights provide an ability to set up constitutional object of identification for common sense,[47] and to promote the position of symbolic excluded groups of citizens with the purpose of conciliating their support.[48] Democratisation of the constitutionalism process might promote social acceptance for the EU constitution.[49] Yet, democratisation

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[42] WILKINSON, p.455
[43] WILKINSON ,p.456
[44] HURRELMANN, (2007), p.347
[45] HURRELMANN, (2007), p.347
[46] THOMAS Risse: 'How Do We Know a European Public Sphere When We See One? Theoretical Clarifications and Empirical Indicators', Prepared for the IDNET Workshop "Europeanization and the Public Sphere", European University Institute, Florence, 20-21.02.2002, Available at <http://userpage.fu-berlin.de/~atasp/texte/pi5s1otn.pdf> (accessed on 10.10.2013), p.5
[47] HURRELMANN, (2004), p.10
[48] HURRELMANN, (2007), p.349
[49] HURRELMANN, (2007), p.358

might not overcome the democratic deficit because it is not just an institutional phenomenon applied with the European Parliament; it implies the deficit of pattern of political purpose and of the public sphere.[50] Or, decisions of the Member States do not reveal the will of the European citizens as their democratic self-determination.[51] Functional concept of the EU law failed to create a democratic relationship between European authorities, the Member States' governments and citizens' rights.[52] Democratisation promotes the legitimacy of integration but it should not be forgotten that democratic deficit is much deeper obstacle to remove it by implementing democratisation. In addition to this, the needs of democracy in the EU level have not developed out of the people, but out of the society which seeks itself as a political unit with settling non-violently and accepting the majority rule in the collective identity.[53] This has been realised in the national framework.[54] In the integration process, democracy has been obstructed by not coherence of the citizens of the EU as a people, by weak common identity for post-national debate. In order to eliminate this obstruction, democracy in the EU level requires long term institutional reform and democracy becomes more consistent in the context of national framework.[55]

Furthermore, as a weakness of debate on the EU constitution, it is not claimed that the aftermath of two world wars of responsibility for the woes of the modern Europe has been rejected.[56] In fact, this claim can promote a common purpose for Europe and it can establish a consensus on

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[50] DARIO Melossi: `Security, Social Control, Democracy and Migration within the `Constitution` of the EU` (2005) 11 European Law Journal, p.12

[51] MÖLLERS Christoph: "Pouvoir Constituant – Constitution – Constitutionalism", Armin Von Bogdandy & Jürgen Bast, eds, Principles of European Constitutional Law, revised 2nd Ed, Hart Publishing / Verlag CH Beck, Oxford / München, 2011, p. 181

[52] MÖLLERS, p.181

[53] GRIMM Dieter: `Does Europe Need a Constitution?` (1995) 1 European Law Journal, p.297

[54] GRIMM, (1995) p.297

[55] GRIMM, (1995) p.297

[56] BELLAMY Richard, `Sovereignty, Post-Sovereignty and Pre-Sovereignty: Reconceptualising the State, Rights and Democracy in the EU`, in: Walker Neil, `Sovereignty in Transition` (Oxford: Hart, 2003) pp.167-189, See also in BELLAMY Richard: `Which Constitution for What Kind of Europe? Three Models of European Constitutionalism` (2006) Legitimationsgrundlagen der Europäischen Union, F. Cheneval, ed., LIT, Available at < http://ssrn.com/abstract=1525473 >, p.17

the character of an EU polity.[57] It seems to be that constitutionalism missed the important point to legitimate itself. The experiences of two world wars may provide a common threat for the people so as to integrate the society and legitimate the EU constitution. There are many crucial obstacles in the EU constitutionalism process, which prevent the Union to have a constitution with a legitimate meaning.

III.   PLURALISM AND DIVERSITY IN THE PROCESS OF EUROPEAN CONSTITUTIONALISM

The EU is characterised by a single legal culture dealing with diversities. This common legal tradition has been affected by the origins and the development of European Community.[58] The view of `multiple demoi` could promote the idea of ethic of toleration among the people, hence; toleration can be a cornerstone of any European public philosophy and political paradigm.[59] A European demos can be defined as a civic demos combined by a civic political culture which arise from common democratic practice.[60] If the common identity for Europe does not define itself by references of history and historic symbols and myths, it could define itself with the future and the societies of the future. This legal culture and pluralistic approach provide European constitutionalism to accept diversity in its context, and even, this might be an answer against the constitutional status quo as an assimilator factor within the society. Here, it can be said that the question of Turkey`s accession and Islamic identity might not be a problem for the common European identity. In other saying, from this point of view; these can be fulfilled by its constitution through the idea of `diversity in the unity` in the European Union. Yet long wait of Turkey`s membership implies pluralism is a valid foundation only for members of a Christian club in Europe. Or, recent rise of the right wing political parties in Europe in 2010s implies that there will be, most probably, less tolerance towards immigrants from the Muslim originated countries.

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[57] BELLAMY, p.17

[58] SHAW, p.4

[59] WEILER J: `The Constitution of Europe` CUP, 1999 p.343-347

[60] TUORI Kaarlo: 'The Failure of the EU's Constitutional Project: A Cultural Discrepancy' in (Ed) Nergelius Joakim, Constitutionalism - New Challenges: European Law from a Nordic Perspective, Martinus Nijhoff Publishers, Leiden/Boston, 2008, p.115

Bottom up or an openly societal constitution draws an attention to spontaneous decision making institutions, distribution of power and place of diversity and pluralism. This constitutional approach refuses to go along with the nation state or personification of political community. It places itself against empire of uniformity or God of uniformity which was formed in the context of modern constitutionalism. Thus, post national movement of the EU constitution seems as an opportunity to set up new forms of democratic freedom. With this, terms of intellectual background allow being positioned pluralism in all stage of constitutional interpretation, formal and informal inclusion of marginalised stances, and also pluralism is based on decentralisation and mutual learning or recognition.[61] The people of the EU can have the new opportunity to renegotiate their rights in the EU constitution. And, they can protect their diversity under the post national constitution. This renegotiation creates an opportunity that the EU constitutionalism might adopt a different view from the tradition of modern constitutionalism which is, supposedly, based on context of popular sovereignty and constitutional association.[62]

On the other hand, social integration within the EU has exaggerated the historical weakness of national state that based on certain national identity. Multiculturalism and diversities all the time expand the gap between the myth of the ethnic identity of the Member States and reality of cultural pluralism.[63] At the same time, rejection of European common identity might be understood as an intention to protect the diversity and plural culture, and to accept their political self determination.[64] It could be said that the requirement of a common identity for the EU constitution has a troublesome clash with national identities and national and regional diversities. The sense of the nation state unites the protection for national cultural characteristic that is regarded as ethnic nationalism and civic nati-

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[61] WILKINSON A. Michael: `Civil Society and the Re-imagination of European Constitutionalism` (2003) 9 European Law Journal, p.462

[62] TULLY James: `Strange Multiplicity: Constitutionalism in an Age of Diversity` (Cambridge. CUP, 1995) p.131

[63] BREDA Vito: `A European Constitution in a Multinational Europe or a Multinational Constitution for Europe?` (2006) 12 European Law Journal, p.335

[64] WEILER J.H.H.: `The European Union: Enlargement, Constitutionalism and Democracy` (1999) This is the text of a lecture given at the Walter Hallstein-Institute of European Constitutional Law, Humboldt University, Berlin, in the Forum Constitutions Europae (FCE 7/99), p.6-7

onalism, thus; nation state has equal interests on protection of cultural heritage and civic society.[65] Furthermore, diversity and pluralism have limited possibility of being protected and promoted while preserving the context of nation state in the Union.

IV.   BREXIT: EUROPEAN CONSTITUTIONALISM IN DANGER

The UK voted for Brexit, by 51.9% (leave) to 48.1% (remain), to leave the EU in 23 June 2016. The United Kingdom has had hesitant relationship with the European Union since its membership and had put distance to the EU's main policies such as euro currency and the border free Schengen area. Recent economic stagnation, immigration crises and democracy deficit in the EU have promoted euro-scepticism among British people. Migration from the rest of other the European countries were somehow tolerated with the requirement of plurality yet especially arrival of refuges and economic migrations from the Middle East and Africa, most of them are Muslim, has made the reality more complicated.[66] The UK prioritises its own borders to protect from the flow of immigration. Rise of right wing political groups in the UK have bought these political and economic crises to blame and accuse the EU.

Moreover, British governments have always sought for the back door not to participate to European constitutionalism. The UK has deeper and serious issues with the concept of the EU, not only for recent political and economic crises. Namely, post-war efforts such as the European Coal and Steel Community (ECSC) and the European Economic Community (EEC) to integrate European countries (especially Germany-France) were formed to avoid another catastrophic war in Europe. As Robin Niblett, the director of the foreign policy think-tank Chatham House, notes that *"the UK had not been invaded, did not lose the war and the UK has historical connections to all sorts of other parts of the world from our empire and commonwealth"*.[67] In other words, the UK did not regard itself as a losing and disputed party of these wars so as to involve such post-war efforts.

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[65] BREDA, p.337

[66] MATEJ MI Avbelj: "Transformation of EU Constitutionalism" *VerfBlog,* 22.06.2016, http://verfassungsblog.de/transformation-of-eu-constitutionalism/, DOI: http://dx.doi.org/10.17176/20160622-161220. (accessed on 11.10.2017)

[67] Interview with Robin Niblett `Bracing for `Brexit`` Council on Foreign Relations" January 17, 2013 https://www.cfr.org/interview/bracing-brexit (accessed on 11.10.2017)

Even though, the UK joined EEC in 1975. Yet euro-scepticism remained strong among British people. One of the main critics argued in that time, *"the European project was already moving beyond mere economic and integration and toward a European 'supersate'."*[68] The EU project is not only matters of economy but also matters of constitutional practices, national institutions and future as being a sovereign State. Sir Derek Walker-Smith noted in 1961 that Community membership ought to create a huge effect on our sovereignty and our constitutional machinery.[69] Likewise as J.C. Jennings PM, noted that the question of sovereignty or loss of sovereignty and political union were ignored during the UK`s joining the E-EC.[70]

The question here is, does the UK really want to be a part of superstate which captures most of the national sovereignty from the Member States? Brexit referendum is the answer to this question and it implies that this referendum creates constitutional transformation in constitutional politics in the UK,[71] to preserve its sovereignty within the nation state. The referendum has been used in the practice of amending and revising constitutions and it has its place in constitutional politics during constitutional transformation, where the people in a democratic polity should be activated as a whole of this constitution-making.[72] Thus if the EU members (here the UK), and officials and private citizens (here the British people) have lost minimalist sense of belonging to the EU, it naturally cannot be constitutional, pluralist, democratic polity based on the rule of law.[73] Prime Minister Theresa May defined Britain after Brexit as *"a fully*

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[68] MCBRIDGE James: "the Debate over Brexit" Council on Foreign Relations" 08.04.2016
https://www.files.ethz.ch/isn/196540/The%20Debate%20Over%20%27Brexit%27%20-%20Council%20on%20Foreign%20Relations.pdf see also, Murkens Jo Eric Khushal, "The Blunders of Brexit:Economics, Sovereignty, and the Constitution" (05.10.2016) LSE Law, Society and Economy Working Papers 14/2016 http://ssrn.com/abstract=2848430. (accessed on 11.10.2017) p.6

[69] HC Deb 02 August 1961 vol 645 cc1480-606, c1511 (Accessed on HANSARD - the transcripts of Parliamentary Debates in Britain and many Commonwealth countries.)

[70] HC Deb 16 November 1966 vol 736 c496.

[71] GÜMPLOVÁ Petra: "Are EU Exit Referenda Good for Democracy?" 08.08.2016 http://www.publicseminar.org/2016/08/are-eu-exit-referenda-good-for-democracy/#.WfBqdlu0OM9 (accessed on 11.10.2017)

[72] GÜMPLOVÁ,

[73] AVBELJ,

independent, sovereign country", and *"no longer part of a political union with supranational institutions that can override national parliaments and courts",* and an independent, sovereign country to decide how to control immigration.[74] Yet, this should be kept in mind that the Brexit referendum 48.1% voted to remain in the EU. This shows a considerable part of British people preserve their sense of belonging to the EU. This can be regarded as a success of the EU constitutionalism process convincing a considerable part of the population to stay in the EU.

The motivation behind the Brexit referendum was parliamentary and national sovereignty as discussed by various actors before and during the referendum. Such manifestations attempted to reconcile national ideas of sovereignty with membership of the EU. Sovereignty was the essential part of the discussions during the Brexit referendum rather than other subjects such as social legitimacy, European Demos, pluralism-diversity, and common mental process. Yet these were indirectly discussed by journalists, politicians and officials and private citizens during the referendum. Nationalism has been one of the main factors bringing the EU into question, and it is a rising trend across the EU and specifically in the UK. The Brexit is a nationalist movement rejecting the character of the EU (the problem-based regulatory style of the EU).[75] In other words, the Brexit embraces the formulation of *"rules for Great Britain should be made by Great Britain and its institutions", "a British population without foreigners",* strict territory control with closed borders, and a national authority without Brussels.[76] Even though the UK is not very suitable model of a nation state because the UK consists of England, Wales, Scotland, and Northern Ireland with limited extend of sovereignties. This may open the gate for Scotland and Northern Ireland, where remain votes were majority, to leave the UK.[77] It is because, during the referendum campaigns, leave side argued to take the UK back from cosmocrats and elites of the EU to re-establish a traditional idea of a sovereign nation state.[78] Hysteria of

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[74] See 'Theresa May's Conservative Conference Speech: Key Quotes' (BBC website, 2 October 2016) <http://www.bbc.com/news/uk-politics-37535527>

[75] MICHAELS Ralf, Does Brexit Spell the Death of Transnational Law?, 17, *German Law Journal,* (Brexit Special Supplement 2016), p.51

[76] MICHAELS, p.51

[77] Result of the Brexit referendum: http://www.bbc.com/news/politics/eu_referendum/results

[78] MICHAELS, p.51

sovereignty turned into a rhetoric of 'Take Back Control' and 'Independence Day for the UK'.[79]

Additionally, Michaels addressed three undervalued aspects of the Brexit.[80] Firstly, the EU law has been made by the EU elites, a transnational network of scholars and decision-makers who benefits from it. It makes decisions on the fate of the poor and weak. Leave voters were mainly among the excluded. Secondly, first aspect reveals the second aspect which is the lack of democratic accountability. There is less attention to extend the benefits of the EU to disadvantageous people from the elites. Leave voters are the ones who did not benefit from it. Thus the Brexit is a greater chance for the have-nots to practice concepts of actual democracy, self-determination and accountability against the EU which did not provide benefit for them. Lastly, the Brexit is regarded as a problem-solving result to have the British state which is also nostalgia for the symbolism of nationally made law and supremacy of a Parliament, and has more attraction than Brussels. Yet, there is a large majority against the Brexit. The EU has failed to create an identity and a positive image, and to salve the leave voters' pleas through law-regulations.[81]

Let's go back to earlier point about the "integration by constitution" through constitutionalism has been failed in the case of relationship between the EU and the UK. The main concern of leave voters was to preserving the UK's parliamentary and national sovereignty. This concern actually reveals that the actors - politicians, academics, and public (51.9% leave voters) - do not give social legitimacy to the EU, do not feel being parts of European Demos, and do not have a common mental process with the citizens of the Union. The UK's social integration with the rest of EU has been developing spontaneously in the real world. The integration is improved by constitutionalism in the normative level but it requires, `a constitutive part of the community`s shared memory`,[82] such as social identity, catastrophic events, and common history, culture and religion

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[79] GORDON Michael: 'The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond…', (2016) 27/3 King's Law Journal, p.334

[80] MICHAELS, p.60-61

[81] MICHAELS, p.61

[82] AVISHAI Margalit: `The Ethics of Memory`, (Cambridge MA: Harvard University Press, 2002), at 12. quoted by Klabbers Jan and Leino Paivi, `Death by Constitution? The Draft Treaty Establishing a Constitution for Europe` (2003) 4 German Law Journal p.1295

within the EU. As it seen in the case of Brexit, the normative influence of constitution has extremely limited effects on social integration without common mental process related to the legitimacy of such integration. This is the point where the European Constitutionalism is in danger and it implies there is a greater problem then having no constitution itself. In this regard, Turkey may reconsider being at member of the EU. This referendum might inspire other Member States to consider leaving the EU. If the flow of immigration to the EU continued as in 2015-6,[83] such flow of immigration could have made the situation more complex and deeper in the EU such as rise of right wing political groups, more political and economic crises. The UK is the first Member State leaving the EU in the time when the Union has economic, political and security crises. These crises reveal new challenges over the constitutionalism process of the EU.

CONCLUSION

Constitutionalism includes political demands to build socially and constitutionally integrated community. The constitutional process has to find its common identity based on common sense and mental process. The EU integration has carried through the process of social organisation and creating social ordering and cultural ideas since its establishment. The EU have had long process to reach the recent level of integration, and during this integration, the EU has successfully integrated economically, socially and politically. Yet, constitutional integration is a kind of multiphase discursive process. The EU has encountered many challenges such as failing in creating European demos, legitimating itself as a `super-state`, and having democracy deficit and recent economic stagnation and immigration crises. Brexit referendum has created a new era for the Union where its weakness and challenges will be loud and clear. These challenges are taken into consideration while debating and analyzing why the EU has not completed its constitutionalism process and specifically why the UK voted in Brexit to leave the EU.

Common basis for the EU constitutionalism such as social identity, catastrophic events, and common history, culture and religion have consi-

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[83] In 2015 and 2016 the EU experienced an unprecedented influx of refugees and migrants. More than 1 million people arrived in the European Union, most of them fleeing from war and terror in Syria and other countries. the EU-Turkey Refugee Deal in March 2016 aims to stop the uncontrolled flow of migrants across the Aegean Sea.

dered as integrative elements of a constitution. These constitutive elements have been absent in the process of the EU constitutionalism. For instance, national identity is one of the main obstacles for the Union to have its own constitution because the Member States and their citizens tend to preserve their own national identity. National identity and nationalism have preventative role in establishing the common European identity. As a result, the constitutional process cannot be conducted by tradition of classic constitutionalism; it needs to adopt the view of post-nationalism with the concept of modern constitutionalism in order to absorb diversity and pluralism within the Union. Yet the EU has democracy deficit which is one of the main reasons why the people of the Union have not given a legitimate meaning for the constitution. This also has caused preventative influence over the integration process and the participation of citizens to the constitutionalism process. Thus, Brexit is a historic event specifying that the Union failed in creating the common mental process for the citizens, social ordering and cultural ideas and European demos. Brexit means that preserving national sovereignty with high level of legitimacy has been prioritised over the supranational project of the Union with democracy deficit, limited legitimacy given by the citizens, and common mental process of having common identity of the Union.

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