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UNITED STATES AND THE EUROPEAN UNION – BASIC (PRE-)CONSTITUTIONAL DIFFERENCES

Just after the Convention on the Future of Europe started its proceedings which led to the Treaty establishing a Constitution for Europe (often called European Constitution) the American example started being invoked by supporters of the Convention efforts as historical evidence that a wide and diverse group of states may successfully unite in order to achieve the status of a global power. The Treaty was drafted in 2003 and then amended by Member States leaders' a year later, but it was not given a chance to prove its ability to unite European nations, as it was rejected in popular votes in France and Netherlands in 2005. However, the very text of the Treaty became the base for the new one, called this time the Reform Treaty, agreed at the end of previous year in Lisbon and supposed to enter into force at the beginning of 2009. Even main framers of the European Constitution admit that the new Treaty "is the same as the rejected constitution",[1] only changed in order to avoid any associations with word "constitution", blamed for defeat. It is the aim of this article to explain why the European Union should seek its own way of building constitutional order, restraining from any state-like ambitions, among them looking up to the United States for an example to follow.

[1] *Lisbon Treaty Made to Avoid Referendum, Says Giscard*, euobserver.com/?aid=25052.

Preconditions for success

In our western cultural area it is assumed that polity which is going to become a political empire should be democratic one. But, as European experience has so far revealed, to provide democratic procedures is far not enough. What is necessary is public understanding that politics is made by a people and for a people. In a broader sense, what is required is a certain kind of political culture, which Larry Siedentop refers to as the "culture of consent", that is

> a culture in which cynicism about the law-making process is kept in abeyance by a kind of confidence in the law which springs from a conviction that the law can be changed if it does not adequately represent popular will. In the longer run, the practice of self-government, when it is not a mere sham at the centre of society but obtains at all levels, generates such a confidence in the law.[2]

We look briefly at the reasons why the United States managed to reach this kind of culture, and why the European Union did not.

Let us start with the basic and well known distinction between two, partly opponent, ways of understanding democracy. The first, liberal one assumes the citizen's status as

> primarily determined according to negative rights they have vis-à-vis the state and other citizens. As bearers of these rights they enjoy the protection of the government, as long as they pursue their private interests within the boundaries drawn by legal statutes – and this includes protection against government interventions. This, at the first glance looks great, but the negative feature of liberal view is that the political process of opinion- and will-formation in the public sphere and in parliament is determined by the competition of strategically acting collectivities trying to maintain or acquire positions of power. Success is measured by citizens' approval, quantified as votes, of persons and programs.[3]

In other words, drawing strong distinction between private and public leads to imposing competitions of private interests on the public sphere. The other one,

> the republican model as compared to the liberal one has the advantage that it preserves the original meaning of democracy in terms of institutionalization of a public use of reason jointly exercised by autonomous citizens.

The threat intrinsic in this model is that "the democratic process is dependent on the virtues of citizens devoted to the public wealth".[4] Simply speaking, it may be too idealistic and vulnerable to instrumentalist use abusing individual rights. The distinction is of course sharp and only indirectly finds support in reality. The reason why Habermas made it was to introduce the third way of understanding democracy which was supposed to unite positive features of the previous two, leaving

[2] L. Siedentop, *Democracy in Europe*, London 2000, p. 16.

[3] J. Habermas, *Three Normative Models of Democracy*, "Constellations" 1994, Vol. 1, No. 1, pp. 2–3.

[4] *Ibidem*, pp. 3–4.

aside their shortcomings (no matter how Habermas did it). However, thanks to this distinction, looking at the American and European Union models of democracy we are capable of grasping the basic differences, whether they are respectively more biased to republican or liberal view. The reasons are to be found first in history.

Tocqueville's lesson

It was Alexis de Tocqueville who gave the most comprehensive explanation why American and European (French) democratic revolutions differed. There were three main reasons for that. The first was that in Europe, due to its history with whole feudal ballast, being free was supposed to require necessarily providing the conditions for equality, today often understood as the equality of results. Unlike Europeans, Americans just felt free as they were born in a free country among equal citizens. Connected with that was the European antireligious obsession which regarded religion as a menace to freedom, whereas Americans regarded religion as an ally to secure freedom (separation of state and church was in Europe supposed to secure the state from the church, whereas in America it was supposed to secure churches from the state). The third idea Tocqueville found astonishing in US was the ubiquitous spirit of local self-government, whereas his own country was famous for the centralization of power.[5]

At the time when the Constitution was being framed, America was a conglomerate of religious prophets leading their people to the promised land, with John Winthrop and his "city upon a hill" as an ancestor, and liberal thinkers, with Thomas Jefferson and his "right to pursue happiness" as the leading example. That combination created a specific climate which bound the will to secure individual freedom with the generally negative judgment of the human nature.[6] To secure freedom in the face of possible abuse of power, the Framers of the Constitution divided the power among three branches of government, at the same time providing wide independence of economic and cultural systems of society.[7] Europeans took only a superficial lesson from their American counterparts.

> What most impressed the French was the very act of constitution-making itself, the constituting or reconstituting of government through the principle of the people as constituent power. What they learned from America was the possibility of having a constituent assembly or a convention. The two revolutions harmonized with themselves in the belief that a people must will its own government by a kind of act or special creation,[8]

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[5] See: A. de Tocqueville, *O demokracji w Ameryce*, Kraków–Warszawa 1996.

[6] It was James Madison who wrote "if people were angels, no government would be necessary", *Federalista nr 51*, [in:] *Eseje polityczne federalistów*, ed. F. Quinn, Kraków–Warszawa 1999, p. 151.

[7] See: M. Novak, *Wolne osoby i dobro wspólne*, Kraków 1998, pp. 65–66.

[8] R. R. Palmer, *The Age of the Democratic Revolution. The Challenge*, Princeton 1959, pp. 266–267.

but it is barely possible to find other profound similarities. Perhaps the reason for enormous differences in securing freedom of people may lay in the patrons that the Americans and the French chose to justify their efforts. Whereas for Americans it was the cautious Montesquieu, whose main ambition was to secure political freedom by the means of dividing the power, the French admired much more radical Rousseau, who sought the way to construct a political system compatible with the human nature which, in his view, is good although enslaved by (Christian) civilization. The very difference in assessment of the human nature led to enormous disagreement between the authors in regard to constitution-making: "where Montesquieu sees a judicious filter that tempers a people's fits of anger or enthusiasm, Rousseau sees a betrayal of general will".[9]

We all know the influence of Rousseau on Robespierre talking about French Revolution as "the despotism of freedom against tyranny". What we should find out now is the reason why Rousseau, the very self-convinced republican and critic of liberalism, became one of authorities most often invoked by supporters of the liberal view on democracy.

Although republican himself, Rousseau was one of the authors who created their political theory taking as a starting point the so-called state of nature, which was aimed to prove the basis for liberal democracy – people are equal from their nature. But,

> what the modern egalitarian individualists did […] is that they reduced the human person to one layer, usually called natural, whether it is the preservation of life, an instinct of utility, self-assertion, or something else. All the rest, that is all other identities related to family, community, government, were left as being inessential to natural human existence and could be freely constructed by the individuals.[10]

Naturally, it was not his goal to reduce human person to one layer. In fact, Rousseau tried to do something – in a way – opposite, i.e. to unite the political system with the nature of the human taken as a whole. The result, however, was pretty much the same: almost complete disregard for the complexity of a person as a member of family, nation, local and religious communities, worker, ruler etc. What has remained the most durable heritage of his thought is typical for modern (leftist-)liberal democracy, namely, the model of democracy dominant in Europe, the belief in a man who is "born free, but everywhere [he] is in chains",[11] so he needs to be liberated. That attitude is best perceivable in modern human rights approach.

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[9] P. Manent, *A World beyond Politics? A Defense of the Nation State*, Princeton 2006, p. 46.

[10] R. Legutko, *Totalitarianism and the Human Soul*, [in:] *Ronald Reagan a wyzwania epoki*, eds. A. Bryk, A. Kapiszewski, Kraków 2005, p. 126.

[11] J. J. Rousseau, *O umowie społecznej*, Warszawa 2002, p. 5.

The American example

Even a glance at the conditions that led to the meeting of American delegates in Philadelphia in 1787, when they decided to create a constitution, should be compelling enough to draw the conclusion that comparing it to the European Convention in 2001, under the leadership of the former French president, Valery Giscard d'Estaing, as some did, is not justified. Of course, it can be claimed that both might have had similar feelings, both shared premonition that further actions of individual states in the face of external threats were unreasonable, but even in that case very weak Americans had much better incentives than contemporary Europeans. The real difference, however, lies in internal conditions for integration. As Siedentop put it, "there was tacit agreement among the delegates that some functions of the British Crown, especially those to do with foreign policy and military matters, were only temporarily in abeyance – waiting, so to speak, for a central authority to take them over once again".[12]

The states just did not develop their sovereign policy. What is more, with respect to the history they shared, there were a few similarities of the highest importance among them: "the habit of local self-government; a common language; an open political class dominated by lawyers; and some shared moral habits".[13]

None of these is to be found among contemporary European countries. The reason why we should not make the American way of reaching a democratic empire an example for the EU may be summarized in the following words:

> in Europe to democracy the way led through society and nation. In America it was reversed. The way to the society and the nation led through the democratic institutions. That is why it was so important to make them (especially the Constitution) "reigning religion".[14]

Thus the Constitution in the United States is barely possible to understand for most Europeans.

> The ambiguity about whether the Constitution itself is supreme – or the organs it creates or the people who ordain it – may seem a unique complication, by which Americans evade the historic logic of sovereignty.[15]

Historical development of the concept of sovereignty in Europe combined sovereignty understood as state independence on the international stage with almost unrestrained power of the ruler within the state. That is why the American concept, providing that international independence is a necessary condition for sovereignty,

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[12] L. Siedentop, *Democracy*..., p. 10.

[13] *Ibidem*.

[14] A. Bryk, *Cywilizacja amerykańska*, "Znak" 2005, No. 1, p. 13.

[15] J. Rabkin, *Law without the Nations? Why Constitutional Government Requires Sovereign States*, Princeton 2007, p. 68.

however not sharing the idea of undivided internal power, is hard to grasp for us, Europeans. American

> sovereignty, then, is not just about restraining ambition but, more fundamentally, about securing loyalty. As a doctrine, it implies some clarity about the conditions under which people will obey or should obey. It depends on some prior agreement on how a particular people will let themselves be governed. Liberal theorists called this the social contract. Americans might call it the Constitution. But the premise of such agreements is that quite a lot of people are independent-minded, ambitious, assertive – and cannot simply be overawed without some reasonable assurances about the power to which they submit.[16]

The Constitution in this sense requires the basic consent among people, consent possible to reach because of reasons listed by Siedentop. Two of these conditions, the habit of local self-government and shared moral habits, are especially prevailing. People who created this country were, in their majority, self-convinced creators of a new better world, heirs of people who escaped Europe engulfed in religious wars to save their own religious beliefs. They decided to work hard together with others on a local level to secure their descendants from the fate they experienced. For Americans what is local is often more important than federal issues, and federal issues are always more important than the interest of the so-called world community. That is why they do not trust international law as it "necessarily undermines the notion of constitutional government at home".[17]

Democratic values without democracy

What is the European Union? The peculiarity of this strange organization does not allow for its easy description; on the one hand it does not have sovereignty, on the other, we cannot any more pretend it does not influence the sovereignty of states it is composed of. Nobody knows exactly which countries can access the EU (it may even be more prudent to ask which ones cannot) and what its political destination (ranging from sophisticated common trade market to a state-like political power) is. However, we are able to describe the EU in a few well-known political and legal categories.

First of all it may be well blended into the idea of the rule of law, based on the 18th-century's rationalism devised as a counterbalance to the unpredictable province of politics. The constitutional idea which stemmed from this concept assumes the necessity of rigid delimitating rules that are supposed to restrain government acting in response to present stimuli. Antoine Condorcet, one of the most self-convinced supporters of this idea, regarded mutual relationship between law

[16] *Ibidem*.

[17] "Trust a global consensus? Half the people in America can barely bring themselves to trust the federal government at home!", *ibidem*, pp. 236–249.

and politics as rooted adequately in the universal reason and circumstances related directly to the person in power, namely his strengths, weaknesses, whims.[18]

The dawn of the existence of the European Communities reveals that the rule of law was strictly applied to their institutions at the same time leaving no space for (transnational) democracy in the law-making process. However, the nature of this process was different in two main organizations, European Coal and Steel Community (ECCS) and European Economic Community (EEC), the first being more supranational and the latter rather international, at least just after its formation. What made them similar in a way were the persons leading main institutions, the High Authority (ECCS) and the European Commission (EEC), respectively, the Frenchman Jean Monnet and German Walter Hallstein. Both were famous for very rigid understanding of the rules created by their institutions and aimed as a restriction on sovereign actions by member states, which led to conflicts with leaders of the states.

The most famous of these was the clash between Hallstein and de Gaulle in mid-1960s. It started innocently, with a disagreement on how to organize the common agricultural market, but led to the withdrawal of the French representative from the Council and thus resulted in a blockade of its work, when de Gaulle understood that Hallstein was going to deprive him of decisive influence on the issue at stake. To understand the reason behind that, we have to move to a slightly earlier date when the European Court of Justice introduced two doctrines that laid the very basis for the development of European integration in that decade: the doctrine of direct effect and supremacy of the law of the Communities.

> The combination of [these] two doctrines means that Community norms that produce direct effects are not merely the law of the land but the "higher law" of the land.[19]

Joseph Weiler introduced a very compelling interpretation of what happened after de Gaulle opposed Hallstein's policy in terms invented by Hirschman, namely "Exit" and "Voice". Exit, as a reaction to changes, comes from market economy – if a client is disappointed with changes, he may resign from goods/services of one provider and start trading with another. Voice is a domain of the world of politics – if we do not like a solution, we can give our voice in order to change it.[20] Having considered that the decision was made by de Gaulle a dozen or so months after the institution of those two doctrines, we can assume that

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[18] See: M. A. Cichocki, *Dlaczego UE nie może być wspólnotą polityczną,* [in:] idem, *Władza i pamięć*, Kraków 2005, p. 169.

[19] J. H. H. Weiler, *The Transformation of Europe*, [in:] idem, *The Constitution of Europe. "Do the New Clothes Have an Emperor?" and other essays on European Integration*, Cambridge University Press 1999, p. 22.

[20] See: A. O. Hirschman, *Lojalność, krytyka, rozstanie. Reakcje na kryzys państwa, organizacji i przedsiębiorstwa*, Kraków–Warszawa 1995, p. 22.

> the "harder" the law in terms of its binding effect both on and within the states, the less willing states are to give up their prerogative to control the emergence of such law or the law's "opposability" to them. When the international law is "real", when it is "hard" in the sense of being binding not only on but also in states, and where there are effective legal remedies to enforce it, decision-making suddenly becomes important, indeed crucial. This is a way of explaining what happen in the Community in that period.[21]

The "empty chair crisis", as it was popularly called, ended in 1966 with the "Luxemburg compromise" which stated that a Member State could veto a decision that it believed would affect its national interests.

Soon, at the beginning of the seventies, ECJ introduced two other doctrines of highest importance, namely the doctrine of implied powers and human rights. The latter was invented as the reply to concerns that moving competences from state to community level may threaten preservation of human rights protected within member states. In that case, "the integrating federal legal development was a response and reaction to disintegrating confederal political development".[22]

The development reached at the beginning of the seventies established a kind of balance, which assured quite effective policymaking on the one hand, and at least a vague sense of popular control of the integration process on the other. In any case, it was not most important as at that time economic integration brought enormous profits to European nations. Yet it soon started to diminish and new improvements were necessary. They saw the daylight with the coming of the Single European Act in 1986, and with the provision that allowed the Council to take decisions by means of majority vote in order to establish internal market understood as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured".

That provision started to be extensively used, yet not from the very beginning was it sure what the effect of it would be. National leaders, among them Margaret Thatcher and the French Foreign Minister, came back home assuring that in regard to 'Luxembourg compromise' nothing had changed, but "reaching consensus under the shadow of the vote is altogether different from reaching it under the shadow of the veto".[23]

The integrationist process received a new impetus but disclosed crucial disadvantages at the same time:

> the legitimacy of the output of the Community decisional process was at least partially due to the public knowledge that it was controllable through the veto power. The shift to majority voting might therefore exacerbate legitimacy problems.[24]

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[21] J. H. H. Weiler, *The Transformation*..., p. 34.

[22] *Ibidem*, p. 32.

[23] *Ibidem*, p. 72.

[24] *Ibidem*, p. 85.

The future problems with accepting treaties through popular votes were due to that development and disability to solve basic economic problems of the EU.

At the beginning of the nineties, when the new Treaty on European Union was introduced, the new political structure specified basic values accompanying the process of integration: freedom, equality, democracy, rule of law, prohibition of discrimination and respect for human rights. Shortly after the establishment of these "democratic values" the main criteria (apart from market economy) for countries who would like to join EU, called the "Copenhagen criteria" were announced.

Can it be regarded a certain threat for democracy, if the polity with only rudimentarily perceptible democratic influence on law-making process starts describing itself as the embodiment of respect for democratic values? Among those who thought so was the German Federal Constitutional Court. After its judgment in the *Brunner* case, where the judges imparted that there might be a potential threat to democracy in Germany, one of the best known researchers in European law wrote about a very peculiar legal construction in the EU:

> the interpretative power of the highest decision-making authorities of different systems must be, as to each system, ultimate. It is for the European Court of Justice to interpret in the last resort and in a finally authoritative way the norms of Community law. But equally, it must be for the highest constitutional tribunal of each member state to interpret its constitutional and other norms, and hence to interpret the interaction of the validity of EC law with higher level norms of validity in the given state system.[25]

It was not by accident that since the nineties we have been witnesses of a more cautious approach of ECJ to the cases that may be controversial from the point of view of state sovereignty: the wise judges knew that

> the success of the constitutional construct [of the EU] would depend not only, or even primarily, on the verdicts of the European Court but on their acceptance by national actors, mainly courts, and principally national constitutional courts.[26]

Similarly, it was not by accident that at the same time the political institution of the EU, namely the European Parliament, started acting more boldly, as the alleged representative of European *demos*. The next amendments to the Treaties, agreed in Amsterdam and Nice, extended the scope of competences of the Communities (and so, of course, did the Maastricht Treaty) and provided the Union with a special mechanism aimed to recognize and punish Member States for infringements of its fundamental principles. Although never used, it moved balance from Member States to the EU, as a guarantor of respect for democratic values, at least on a propaganda level.

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[25] N. MacCormick, *The Maastricht-Urteil: Sovereignty Now*, "European Law Journal" 1995, November, p. 264.

[26] J. H. H. Weiler, *The Reformation of European Constitutionalism*, "Journal of Common Market Studies" 1997, January, p. 101.

The rejected Constitutional Treaty made a significant step on this path. First, it gave legal power to the Charter of Fundamental Rights drafted in Nice, secondly, it created the system of rule which presupposed

> centralization of power understood as its concentration in internally cohesive political institutions isolated from surroundings, based on formal procedural rules regulating might and influence (i.e. the government and the parliament).[27]

Especially giving the Charter binding force together with formal recognition of the supremacy of European law over national law in the Treaty, could lead to a new, extensive interpretation of its competences by ECJ.[28] The Reform Treaty from Lisbon is pretty much the same, even though it does not include the text of the Charter (vesting, however, the Charter with legally binding force) and, fortunately, leaves aside the rule of supremacy. (It is nevertheless present in a legally non-binding political declaration attached to the Treaty and, naturally, exists as a product of ECJ's jurisprudence). It is not the best way of strengthening democracy at the European level.

Undemocratic Parliament

It is usually said that the Union becomes more democratic as the European Parliament gains more and more power. However, the mere fact that law-making procedures involve the Parliament does not mean that the procedure is democratic. The problem lays in the Parliament and its relation to its people ; as "The Economist" put it, "the European Parliament is more important bureaucratically but in a democratic sense remains frivolous".[29] Let us briefly look why.

The problem for European democracy lies mainly in public reception; to work properly democracy needs intermediate bodies between the Parliament and its people, and these are hard to find on the European level, especially in regard to European biased media.[30] Apart from that, if the European legal system was to act in a democratic way it would first face the problem of diversity of legal and cultural traditions of Member States. What is more, shifting competences to the European level makes the distance between citizen and the center of power vanish away,[31]

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[27] K. Szczerski, *UE jako otwarty system konstytucyjny*, "Międzynarodowy Przegląd Polityczny" 2006, No. 2, p. 240.

[28] See: M. Brachowicz, *Dlaczego Karta Praw Podstawowych UE budzi sprzeciw?*, "Międzynarodowy Przegląd Polityczny" 2007, No. 3.

[29] *Not Normal*, "The Economist" 2007, January 20.

[30] For a comprehensive view, see: D. Grimm, *Does Europe Need a Constitution?*, "European Law Journal" 1995, Vol. 1, No. 3, pp. 292–297.

[31] See: R. Dahl, *Is International Democracy Possible? A Critical View*, [in:] *Democracy and Federalism in the European Union and the United States. Exploring Post-national Governance*, ed. S. Fabbrini, London–New York 2005, pp. 198–199.

and can hardly be treated as a democratic development. Due to the problems mentioned only briefly above, the European Parliament can hardly be perceived as filling the democratic gap in the EU.

The problem with democratic Union, in the republican meaning of democracy, is more profound: it was regulated from above throughout its history. The habit of self-government is hard to be found (among the large countries, Poland from the 15th to the 17th century is one of the rare examples). The way Americans and Europeans perceive democracy is instructive;

> when European and Americans talk about democracy they don't talk exactly about the same thing. In Europe democracy means first of all legal principles; in the US it means spiritual principle and continuous process of selection. European critics perceive American democracy as populist; Americans regret that European democracy is aristocratic. Political leaders in Europe consider their role as educating the nation; in the US their role is to follow the nation.[32]

Taking this basic difference into consideration it is not strange that a conservative American lawyer was so astonished when giving his judgment on what Europeans did in the Convent; "the constitutional treaty, in the most fundamental ways, proposed to do the opposite of what a constitution normally does – that is, confer definite powers within demarcated limits".[33]

If there is no democratic polity moving power to the higher level democracy is always threatened , even if we speak about competences instead of power. And there can be no democratic polity if nations' leaders cannot even reach an agreement whether Europe has a Christian tradition important enough to be commemorated in a basic text regulating power on the continent.

A famous French philosopher remarked ironically that EU has achieved the state of "pure democracy", so

> democracy without a people – that is, democratic *governance*, which is very respectful of human rights but detached from any collective deliberation.
>
> The European version of democratic empire distinguishes itself [from the American one – MB] by the radicalism with which it detaches democracy from every real people and constructs a *kratos* [power – MB] without a *demos*.[34]

So, according to the same author, we have now a schizophrenic state in which we endlessly subscribe to "democratic values", disregarding democracy itself. "Embracing democratic values, we have forgotten the meaning of democracy itself – its political meaning, which is self-government, the self-government of a people".[35]

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[32] G. Sorman, *Made in USA*, Warszawa 2005, p. 166.

[33] J. Rabkin, *Law without*..., p. 138.

[34] P. Manent, *Democracy without Nations? The Fate of Self-Government in Europe*, Wilmington 2007, p. 7.

[35] *Ibidem*, p. 40.

The lesson we should take from the American example is that we should do differently. We cannot and should not act as if there was a possibility to create a united pan-European political power based on a basic agreement on values and identity acceptable for all, or at least for the vast majority of people, in the EU (as the Charter of Fundamental Rights pretends to). We should not build a European people, but a "union among peoples", that is create "a political culture which learns new ways to deal with the 'other'".[36] That means that it is necessary to reverse the tendency of moving competences to the European level, even at the expense of temporary reduction of the efficiency of the EU. Otherwise, we risk loosing popular support for the process of integration and its collapse, or at least a profound crisis. The Polish opposition to the Charter of Fundamental Rights, put into words in the special protocol (No. 7) restricting the Charter's effect upon Polish legal system, is in this sense an expression of profound concern about the state of our democracy, that is self-determination of basic moral principles that play an absolutely essential role for normative foundation of every society.

It is worthwhile to rethink the changes for European project when there is still time for it. However, it does not seem to me that to appoint a "reflection group" on the future of Europe composed of nine "sages" nominated by the powers that be and being a part of governmental establishment is the best way to do it…

[36] J. H. H. Weiler, *The Reformation*..., p. 118.