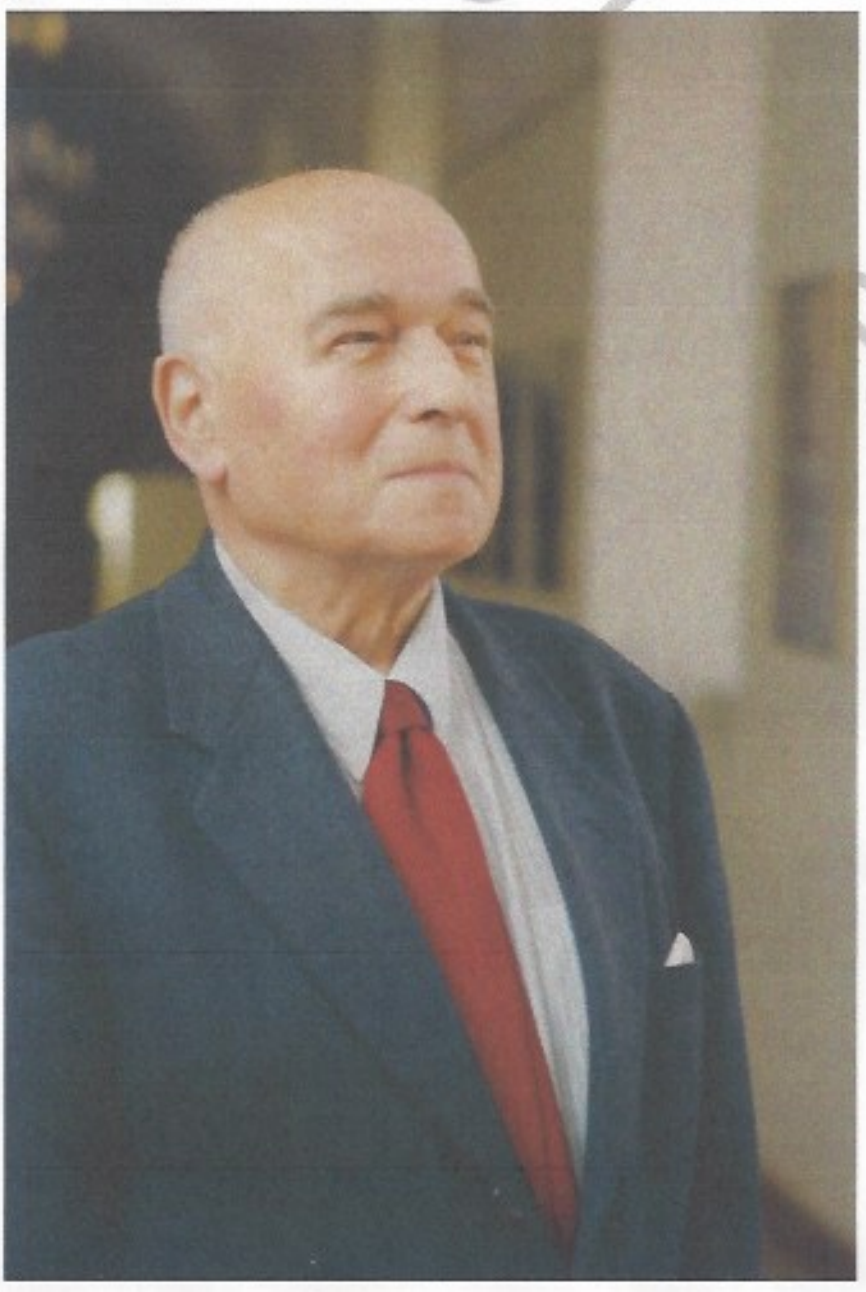
"UBI JUS, IBI REMEDIUM, Księga Dedykowana Pamięci Profesora Jana Kolasy", ed. Bartolomiej Krzan, C.H. Beck, Warsawa, 2016 (Book dedicated to the memory of Professor Jan Kolasa



*Jan Kolasa*

Sir David Edward*

# An Appeal to First Principles

It is an honour to have been invited to contribute to this collection of essays dedicated to the memory of Professor *Jan Kolasa*. His work was distinct and unique in its anticipation of legal developments in Poland. His study of the legal character of the European Communities began long before the accession of Poland to the European Union could even have been contemplated and his writings introduced academics and students to the new ways of thinking that this would involve. I was privileged to meet him in Wrocław in the early 1990's and we worked together on the curriculum for Masters' courses at the new Viadrina University at Frankfurt-an-der-Oder – a university destined to bring together students and scholars from all over Europe in the spirit of former times.

That was a time of optimism and hope. After two decades of stagnation, the European Community had been given fresh impetus by the Single European Act, followed by the 1992 Programme to complete the Single Market. The Maastricht Treaty laid the foundations for economic and monetary union and „social Europe".

At that time, it seemed only natural that Poland and the other countries of Middle and Eastern Europe should find their place, as constitutional democracies, in a revitalised European Union. Those like *Jan Kolasa* who had, in darker times, maintained the principles of international law had prepared Poland for a new beginning.

In an article written in 1989, *Francis Fukuyama* speculated about „the end of history": What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.

That passage is well known, but *Fukuyama* ended his essay in a different vein:

I can feel in myself, and see in others around me, a powerful nostalgia for the time when history existed. Such nostalgia, in fact, will continue to fuel competition and conflict even in the post historical world for some time to come. Even though I recognize its inevitability, I have the most ambivalent feelings for the civilization that has been created in Europe since 1945, with its north Atlantic and Asian offshoots. Perhaps this very prospect of centuries of boredom at the end of history will serve to get history started once again[1].

* Professor Emeritus, University of Edinburgh; Judge of the European Court of Justice 1992–2004.

[1] *Francis Fukuyama*, The End of History?, The National Interest, Summer 1989. Later expanded in book form in: The End of History and the Last Man, New York 1992, *passim*.

„Nostalgia for the time when history existed" has indeed proved more powerful than a naïve belief in the end of history. We have had too much history of a violent and uncompromising kind, fuelling competition and conflict. The hopes of the 1990's have not been fulfilled, and the world is more dangerous now than it was then. Random terrorism, outright war, mass migration and every form of economic distress have produced a collective nostalgia for what people are led to believe was a cleaner, safer and less complicated world order.

Britain (or, more accurately, England and Wales) has now voted to leave the European Union in response to a promise of sovereignty regained: „We want our country back". At the same time, the Constitutional Court of Poland is under political attack in order to recapture a lost vision of democracy from the hands of unelected judges. There are parallel phenomena of collective nostalgia in many, if not most, other European countries.

The longing for an imagined past and dissatisfaction with the present is reflected in a distrust of the institutional machinery of constitutional government. The legislature is distrusted because (it is said) politicians are venal and self-serving. The executive is distrusted because it consists of faceless bureaucrats. The judiciary is distrusted because the unelected judges defy the will of the elected legislators – the very people who are distrusted because they are venal and self-serving!

Loss of confidence in our institutions is probably inevitable, particularly at European level. No democratic constitutional arrangement could reasonably have been expected to provide instant solutions for the continent of Europe to the economic crisis beginning in 2008 or the civil wars in the Middle East and Africa. The problems are too many, too various and, in many respects, unprecedented. Nevertheless, rather than recognize the nature and scale of the problems, it is easier to say „Europe is responsible and Europe has failed", although the Europe that has failed is ultimately no more than the sum of the Member States and its citizens.

There are many proposals for institutional change, as there always have been. But the present crisis and the pressures that led to the British vote for „Brexit" go further. They put in issue the fundamental principle on which the European Union was built – freedom of movement of goods, persons, services and capital. The words of the Treaties[2] may seem dry and technocratic, but they prefigure a new ideal of a Europe where individuals are free to choose their own destiny – to go where they want, to live where they like, and to trade and to work where they can.

In 1963, the European Court of Justice explained the novel character of the EEC Treaty as an international instrument:

The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals[3].

The conception of individuals as „subjects" of a treaty was almost entirely novel in classical international law. During the Second World War Professor *Hersch Lauterpacht*, later a Judge of the International Court of Justice, had written:

[2] The Treaty on European Union and the Treaty on the Functioning of the European Union, especially TFEU, Part Three, Title IV (OJ C 326, 26.10.2012, p. 47–390).

[3] Judg. ECJ on 5.2.1963, C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECR 1963 00003 (emphasis added).

The sovereign State, in an exclusive and unprecedented ascendancy of power, became the unsurpassable barrier between man and the law of mankind. The human being became, in the offensive, but widely current terminology of the experts, a mere **object** of international law[4].

In a letter to his wife he explained the essence of his belief:

'The purpose of the law of nations cannot be permanently divorced from the fact that **the individual human being – his welfare and the freedom of his personality in its manifold manifestations – is the ultimate unit of all law**[5].

In everyday life, economic and social rights are fundamental to the welfare of citizens and the freedom of their personalities in their manifold manifestations. The right of free movement guaranteed by the EU Treaties is not some sort of ancillary right, secondary in importance to the human rights guaranteed by the European Convention on Human Rights. It is a guarantee of human dignity.

Thus, the Treaties are a direct challenge to „the exclusive ascendancy of power of the sovereign State". They provide a legally binding context or framework within which individuals can find their way in the world without more interference from the organs of the State than is strictly necessary and proportionate.

Advocate General *Tesauro* explained the Treaty system in this way:

„That system is based (…) on a contractual foundation. The Treaty (…) contains a series of obligations on Member States (…), which have been freely subscribed to (…) The peculiar, ultimate aim of the contractual basis in the case of the Community is integration and more specifically »lay[ing] the foundations of an ever closer union among the peoples of Europe«[6], inter alia through the achievement of the common market. It follows that traditional instruments, those of international law in fact, prepared in order to promote the due, precise fulfilment of obligations on the part of the Member States have resulted and continue to result to a very great extent in giving maximum, direct relevance to the legal position of individuals. The reason for this is that **the obligations of the Member States and Community institutions are directed above all, in the system which the Community system has sought and sets out to be, to the creation of rights of individuals. This is the picture drawn by the authors of the Treaty and consolidated by the Community legislature**"[7].

It is unfortunate that the commitment to an „ever-closer union among the **peoples** of Europe" has been interpreted as a commitment, whatever the circumstances, to an ever-closer **political** union among the **States** of Europe. *Robert Marjolin*, the first Secretary General of OEEC, a leader of the French delegation in the negotiations for the EEC Treaty and later one of its first Vice-Presidents, wrote in his Memoirs:

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[4] *H. Lauterpacht*, An International Bill of the Rights of Man, Oxford 1945 (republished 2013), Introduction, p. 5 (emphasis added).

[5] Letter dated 4.9.1942, quoted in *Elihu Lauterpacht* The Life of Sir *Hersch Lauterpacht* (Cambridge 2010), p. 252 (emphasis added).

[6] Citing the Preamble to the EEC Treaty.

[7] Opinion of the Advocate General in Joined Cases: C-46/93 and C-48/93 *Brasserie du Pêcheur v. Germany* and *The Queen v Secretary of State for Transport*, Judg. ECJ on 5.3.1996, C-46/93 *Brasserie du Pêcheur v. Germany* and *The Queen v. Secretary of State for Transport*, ECR 1996 I-01029, ex parte *Factortame Ltd and others*, ECLI:EU:C:1995:407, § 39 (emphasis added).

Because the term „United States of Europe" creates dangerous illusions in minds that are ignorant of history, I have always refused to use it[8].

It is true that *Robert Schuman*, in his Declaration of 9.5.1950[9], in which he proposed the creation of the Coal and Steel Community, spoke of it as laying „the first foundations of a Federation of Europe". Ever since, some dedicated Europeans have dreamed of a „United States of Europe". But *Schuman* also warned: Europe will not be conjured up at a stroke, or by some master plan. It will be attained through concrete achievements that lead in practice to a community of interest.

His vision was that an economic community would provide the yeast or leaven (*ferment*) for a wider and deeper community of interest and purpose.

*Jan Kolasa* urged this pragmatic approach to European integration in his commentary on the Treaty of Maastricht:

„It is inappropriate to fit (...) the newly created EU within the traditional strait jacket of international organisations or of the democratic institutions of Member States. There is simply no comparative point of reference for the EU. (...) One of the great assets of this imperfect European edifice in the making is its peculiarity. It is an entity open for further gradual growth. (...) It has a built-in approach to gradual and piecemeal realisation of objectives by a never-ending process of organisational improvement. That is why the EU will never be classified as a complete international organisation. Rather we should look at it as a process of achieving new goals, and not as some preconceived and well-defined structure"[10].

Enlargement to a Union of 28 or more Member States and a knowledge of their complex history should surely dispel the illusion that a fully integrated political union, even (sadly) without British participation, is attainable within the foreseeable future or, indeed, that it is desirable. It has tended to distract our attention from, and so prevent us taking pride in, the „concrete achievement" that consists in giving practical and legal content to the belief that „the individual human being – his welfare and the freedom of his personality in its manifold manifestations – is the ultimate unit of all law".

The recognition and protection of the individual as the ultimate unit of law is, however, mere empty rhetoric unless individuals are given the means of vindicating their rights through the courts. Professor *J.D.B. Mitchell*, the first Professor of European Institutions in Britain, spoke in his inaugural lecture about the role of courts in responding to the demand for individuals to be able to make their voice effectively heard:

Governments and governmental bodies have as many reasons for conniving among themselves as they have for opposing each other and, in the evolution of government, it is important that, within acceptable limits, individuals should be able to participate through the neutral mechanisms of courts, not merely in maintaining the framework of rules, but also of advancing its construction. (...) **The role of courts has, or should have, something to**

[8] *R. Marjolin*, Le Travail d'une Vie: Mémoires 1911–1986, Paris 1986, p. 267, and in English translation, Architect of European Unity, Memoirs 1911–1986, London 1989, p. 268.

[9] „The Schuman Declaration" – The original French text is available at: https://www.google.co.uk/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=schuman%20declaration%20pdf (accesse: 20.9.2016).

[10] *J. Kolasa*, The Treaty of Maastricht: an outline of basic constitutional problems, in: *J. Kolasa* (ed.), European Communities (Union): Selected Legal Problems, Wroclaw 1995, Vol. 2, p. 26–27. I am grateful to Professor *Tomasz Koncewicz* for this reference and its translation.

**do with the realities of democracy**. Properly organised it is through them that the individual can play a larger and more significant part in government while gaining a greater sense of security[11].

Those of us who are old enough to remember the times of despair, then of hope and optimism, and now perhaps of bewilderment, can nevertheless look back and reflect that, in spite of all the hostile rhetoric, the achievements of the past half century have been immense and the community of interest amongst our peoples is real. Most of all, as lawyers, we can claim that it is in the courts that equal treatment, non-discrimination and freedom of movement have become a practical reality for our fellow citizens. It is in the courts that those in authority have had to learn what has sometimes been a hard lesson for them: that the fundamental freedoms are to be restricted only for reasons of overriding public interest and in ways that are objectively justified, necessary and proportionate.

*Jan Kolasa* played his own distinguished part in this construction and it is a great sadness that we have been unable to pay tribute in person to a great lawyer and a great citizen of Poland.

[11] *J.D.B.Mitchell*, Why European Institutions? University of Edinburgh Inaugural Lecture No 39, delivered on 5th November 1968 (emphasis added).