Developments

Review Essay – Principles of European Constitutional Law (Armin Von Bogdandy & Jurgen Bast eds., 2006)

By Giuseppe Martinico[*]

[PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (A. Von Bogdandy & J. Bast eds., 2006): ISBN: 1841138223 / 9781841138220, 810 pp, £ 150.00

A. Introduction

Recently the German *Bundesverfassungsgericht* (Federal Constitutional Court) knocked on the European Union's door with its impressive judgment on the Lisbon Treaty, recalling all the weight of the German scholarship tradition steeped in the German dogmatic flavor: the attention to the history of sovereignty and the attempt to catch all the European Union constitutional system's life revealed the systemic approach peculiar to the German dogmatic scholarship.

Another way to frame that judgment could be to think that the *Bundesverfassungsgericht* advocates a German way for the European Union (EU), which neglects the EU peculiarity and pushes for a nearly impossible legal transplant to the supranational level.

The third way one could propose to approach such a pronouncement is to start from the book I am going to review, in order to have a valid toolbox from which the "brave" reader of that ruling could get the conceptual apparatus necessary for such a demanding reading.

This volume represents the translation, with some changes, of a book previously published in Germany,[1] where its second German edition has been recently published. Because of the well known content of this book - it has already been reviewed in the most prestigious journals, *Common Market Law Review*, *European Journal of Contemporary Research* and *European Law Journal,* among others - and given the length of that work, I will limit myself to a brief overview of the papers included, devoting a few pages to the general connecting threads of the volume.

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[1] ARMIN VON BOGDANDY & JURGEN BAST (eds.), *EUROPÄISCHES VERFASSUNGSRECHT* (2003).

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The book is the outcome of a project coordinated by the two editors and hosted at the Max Planck Institute for Comparative Public Law and International Law, which involved German, and one Austrian, scholars. It is not the first time that von Bogdandy is the main figure of projects like that, since he was, together with Joseph Weiler, one of the editors of a project called "The New German Scholarship", which carried out a special section in the Jean Monnet Working Paper Series.

The effort behind these initiatives rests on the necessity to offer a complementary contribution and perhaps even serve as an alternative to the English literature. As some of the papers included in the book demonstrate, this choice has also a negative consequence: the exaggerated attention to the authors' national scholarship and the lack of references to the English literature produces the impression of rigidity and self-exclusion. It is not a coincidence that in her chapter, Antje Wiener seems to contradict such a nationalistic and rigid tradition in favor of a much more flexible approach,[2] although she seems to be the only one to do so. However, the inspiring idea is worthy of attention, as many other scholarly traditions are wrongly neglected by the dominating English literature; in this sense an apparently parochial book is paving the way to challenge the scholarly monopoly of the made-in-the-UK literature. That is just the first of a series of merits of this book. three years after its publication, this volume has become a sort of reference for the scholars interested in European Constitutional Law and a mandatory reading for everyone wishing to conduct research in this field.

B. The structure of the book

The volume is composed of five sections: the first section aims at defining the field of European Constitutional Law, while the second deals with institutional issues. The third section is about individual rights, while the fourth is devoted to the constitutional aspects of economic law. Finally, the last section tackles the substantial issues of the relationship between the EU and the member States, the finality of the European integration and the advantages of the European Constitution.

It covers as many areas as possible, confirming another element of the German scholarship: the tendency to conceive Law as a system guided by fundamental principles, namely a set of principles constituting the core of what von Bogdandy calls European Constitutional Law.

Is there any room after the French and Dutch referenda for a European Constitutional Law? Did those referenda deprive European Constitutional Law of its very object - a

[2] Antje Wiener, *Soft Institutions*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, 420 (A. Von Bogdandy & J. Bast eds., 2006).

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Constitution? When dealing with these questions, volumes like the one being reviewed help to preserve scholars' continued trust in the good reasons for a real European Constitutional Law despite the present hard times.
It aims at providing a sort of overview of the German scholarship in this field and it is interesting to note how, from the first lines of the volume on, the editors stress the real objective of the work: "[w]hile politics wrestles with the Constitutional Treaty (and one could say the same with regard to the present Reform Treaty) as the founding legal document, *de lege ferenda* this volume presents European Constitutional Law not as a mere project but as binding valid law, as *lex lata*" (Preface). The basic assumption of the work is thus that there exist a set of fundamental principles which may be called Constitutional law of the EU, since they have founded a new legal order and are the basis for it.

Part I is devoted to the definition of "The Field of European Constitutional Law". It opens with a long essay by von Bogdandy, who tries to stress the insufficiency of an approach limiting European Constitutional Law to a "body of law that can only be changed under qualified requirements - above all the procedures according to Article 48 EU[...] This learned but traditional portrayal of primary Union law neglects, however, important issues which, at least according to the German tradition, are crucial to the science of constitutional law".[3]

Having said that, the author decides to point out the importance of European Constitutional Law understood as "a doctrine of principles" with many fundamental functions in the life of a legal order. First of all, the development of the doctrine of principles will allow readers to understand the constitution as something organic, as the author expressly makes reference to the continental tradition of legal scholarship: the legal order is a system inspired by and readable in the light of its own principles. Among the other functions of such a doctrine, von Bogdandy recalls how "a doctrine of principles plays a role in the creation of an emerging European identity. A European identity requires a common understanding of the polity by the citizens, something for which constitutional principles could be an important vehicle".[4]

Finally, the development of such a doctrine might "channel and perhaps rationalize political and social conflicts, treating them as conflict of principles which can be resolved according to the rules of legal rationality".[5] This idea of the intrinsic rationality of the Constitution as a legal "organic whole" is the most evident feature of the German "touch" to these issues.

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[3] Armin von Bogdandy, *Constitutional Principles*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (A. Von Bogdandy & J. Bast eds., 2006).

[4] *Id*., 7.

[5] *Id*., 5.

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The essay then goes on to deal with the analysis of the founding principles of a supranational dimension, although the author admits that "European constitutional law is closely intertwined with the national constitutions, forming the 'European constitutional space'".[6]

The second essay, by Stefan Oeter, insists on the understanding of the EU as a federal polity. First, it provides an overview of the several "theoretical approaches and models using federalist concepts as a tool of conceptualizing the European Union" with the ideas of an "unfinished federal State", and of the "United States of Europe" as options present in the various phases of the European integration process. Secondly, the author offers a selection of the classical themes of the theory of federalism - see the section on the question of sovereignty - and tests them at the supranational level. The essay then moves to a cost-benefit analysis of the federal analogies, showing the outdated nature of the sovereignty debate and contesting the untouchable pillars of what he calls the traditional patterns.

The chapter by Christoph Grabenwarter provides a bottom-up perspective of the constitutionalization process. It deals with the question of the relationship of the EU law primacy over national law, with national constitutional provisions regarding EU law and finally with the comparison of the similarities and differences in the national strategies to adapt to EU law.

In the chapter by Robert Uerpmann-Wittzack, the author considers the "constitutional role of multilateral treaty systems", insisting on what he calls the international supplementary constitutions, starting from the notion of "*Völkerrechtliche Nebenverfassungen*" ('international supplementary constitutions').[7] The basic idea is that sometimes national constitutions may contain gaps "which are filled by referring to international law".[8] From this standpoint, the author analyses the importance of international documents such as the European Court of Human Rights (ECHR) and the World Trade Organization (WTO) systems treaties.

The last contribution of the first part of the volume, by Christoph Möllers, attempts to tackle the ambiguity of terms such as "constitution", "constituent power" and "constitutionalization". The author begins his reflection by drawing a distinction between

[6] *Id*., 9.

[7] Christian.Tomuschat, *Der Verfassungsstaat im Geşecht der internationalen Beziehungen, 36* VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 51–53 (1978).

[8] PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (note 4), 145.

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the idea of the "constitution as a politicisation of law",[9] and that of the "constitution as juridification of politics".[10] He then goes on with an analysis of the complicated relationship between State, Nation and Constitution. He devotes his last pages to European Constitutional Law as a peculiar field of legal research and to the Constitutional Treaty as a "semantic constitution" to indicate a sort of masque-constitution "behind which a completely different political system is hidden",[11] thus adapting a concept devised by Karl Loewenstein[12] to the EU context.

Part II of the book focuses on the "institutional issues" and opens with a contribution by Philipp Dann on the political institutions of the EU. In order to provide a critical overview of the institutional setting, the author uses the notion of "executive federalism", by which he means "a system of interwoven competences... complemented by the institution of a Council which is composed of the executives of the Member States...through this organ, the Member States are directly involved in the making of the law, which they have to execute".[13] After analyzing the current institutional setting, Dann moves on to discuss the possible scenario for the European institutions in light of the Constitutional Treaty.[14]

In the next chapter, Franz Mayer draws a detailed picture of the relationship between courts in the multilevel legal order. Paying attention to both the European Court of Justice and the highest national courts, he distinguishes between a procedural perspective, by dwelling on the duty to make preliminary references under Article 234 of the European Community Treaty, and a substantive perspective. In the last part of his fascinating chapter, after giving a definition of multilevel constitutionalism, Mayer adopts what he calls a theoretical perspective, by attempting to contextualize the role of the court in the multilevel system.

In their chapter "The Vertical Order of Competences", von Bogdandy and Bast show how one can infer a possible list of competences by looking at the goals of the European Community and the European Union, which are expressly listed in the Treaties, and at the tasks of the institutions.[15] After having analyzed the issue in light of the Constitutional Treaty, the authors conclude by emphasizing the continuity between the current situation

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[9] *Id*., 185.

[10] *Id*., 188.

[11] *Id*., 226.

[12] KARL LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 203 (1957).

[13] Philippe Dann, *The Political Institutions*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (note 4), 239.

[14] The book came out before the two referenda in France and in the Netherlands.

[15] Because of the inevitable connection between vertical and horizontal orders of competences.

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before the entry into force of the Lisbon Treaty and that designed by the Constitutional Treaty: "It would be a grave error to consider the Union's vertical order of competences as finally settled; it remains in a flux, it remains scholarly exciting".[16]

In the next chapter, Bast focuses on the legal instruments, providing an interesting comparison between the current situation and that produced by the Constitutional Treaty. On her part, Wiener analyzes the so-called soft institutions, giving a political-science perspective of the constitutionalization process. By soft institutions, the author means "ideas, social and cultural norms, rules and routinised practices",[17] which may have an impact on the institutions of constitutional law.

Part III of the book opens with a contribution by Satefan Kadelbach devoted to Union citizenship, summing up the history and the notion of European citizenship, its legal basis and the whole range of rights included under its umbrella. After such an overview, the author moves on to deal with the content of the Constitutional Treaty, before reflecting on the future of citizenship in a multilevel system, stressing the strong connection between that and the citizens' active participation, concluding that: "[t]he Union will only come closer to its citizens if it further follows its recent policy to offer identification by real opportunities of participation. Otherwise, Union citizenship will remain a weak construction behind its ambitious facade".[18]

In the next chapter, Jürgen Kühling recalls the phases of the development of fundamental-rights protection "from refusal to recognition"[19]; from the emergence of "an autonomous specification by the Community on the basis of common constitutional traditions and the ECHR" to the new era characterized by the Nice Charter of fundamental rights[20]. It is interesting to note how the author recognizes a catalyst effect to the not-legally-binding Nice Charter.

A different contribution by Thorsten Kingreen focuses on fundamental freedoms, such as the free movement of goods and workers, the freedom of establishment, provision of services and capital. The author explains the main difference between fundamental rights and fundamental freedoms as follows: "[w]hereas the fundamental rights protect against all unjustified restrictions of liberty, the fundamental freedoms only provide protection from specific cross-border infringements".[21]

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[16] *Id.*, 372.

[17] *Id.*, 421.

[18] *Id.*, 499.

[19] Jürgen Kühling, Fundamental Rights, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (note 4), 504

[20] *Id.*, 507 et seq.

[21] *Id.*, 567.

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Part IV of the book is devoted to the "Constitutional Aspects of Economic Law". It opens with a chapter by Armin Hatje,[22] who stresses the relevance of this field of research from a constitutional viewpoint, and provides a definition of economic constitution and some delimitations during analysis. In order to deal with this vast issue, the author touches upon many policy areas, including distribution, social and employment policies and also considers the discretionary power of the Member States in the field of economic policy.

The next chapter is by Josef Drexl where, according to him, competition law is a fundamental part of the economic constitution, because it plays an important role in understanding the constitutional principles. At the same time, the author acknowledges that competition law is influenced by the emergence of constitutional principles. This is perhaps the contribution in which the weight of German dogmatics is more evident: it emerges from the effort made to read the European Economic Constitution in the light of a domestic conception.[23] This can be explained by the importance of the topic of the Economic constitution, which was a central issue of the legal debate after the Second World War.

Finally, section V, entitled "On Finality: Contending Legal Visions", containing the broadest essays of the book, makes every attempt at summarizing their content very difficult.

In the first part of this chapter, Urlich Everling focuses on the EU as a policy maker suspended between national and community policies. After resolving the goals of the EU, the author stresses the main phases in the building of an Economic and Political Union. In the last part of his contribution, Everling deals with the constitutional structure and peculiarities of the EU, at the same time resuming and grouping the main views on the Union's legal nature.

In his work "On Finality", Ulrich Haltern starts from an assumption: "European discourse is no longer attracted to the question of what we should do (for instance, with a view to the democratic deficit). It is now fascinated by the question of who we are".[24] The issue of identity and symbology is thus fundamental. Starting from what he calls a "cultural study of law", Haltern analyses the state of the Union between post-politics and law, born as a project of modernity.[25] The EU is currently in a challenging phase where aesthetics and symbologies are acquiring importance as articulated by Haltern: "[t]he debate on EU

[22] Armin Hatje, *The Economic Constitution*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, 587- 632 (A.von Bogdandy & J. Bast eds., 2006).

[23] See for example the use of the Freiburg School *Ordoliberal* model.

[24] PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (note 4), 730.

[25] *Id.*, 734.

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constitutional legitimacy as model from formal validity (the democratic deficit) to foundational myths (issues of European identity and demos). Europe is redefining its political imagination".[26]

The chapter by Paul Kirchhof reflects on the state of the Union starting from Art. 1, p. 2, of the European Union Treaty (EUT) and the Preamble of the ECT, according to which the EC and the EU are aimed at creating "an ever closer union among the peoples of Europe", in the light of some recent events, including the enlargement and, at the time of the publication of the book, the signing of the Constitutional Treaty. In his final remarks, despite the evolution which characterized the EU, Kirchhof concludes that "the development of the states in Europe currently strengthens the traditional foundations of European Law: statehood and fundamental rights",[27] without denying the peculiar nature of the EU conceived as a *Staatenverbund* (a Union of States).

The last paper of the book, by Manfred Zuleeg, is devoted to the "Advantages of the European Constitution". After describing the current European Constitution as a sort of puzzle composed of the treaties and the judge-made law of the European Court of Justice (ECJ), the author moves on to stress the pros and cons of the Constitutional Treaty. Among the first ones, one can recall the clearer division of competences between the EU and the Member States and the entry into force of the Charter of Nice, for example.

C. Conclusion

As I have already pointed out, the book was written at the "glorious time of the Constitutional Treaty" and the authors could not anticipate the deafening collapse of such a document, but unsurprisingly the majority of the contributors were skeptical, or at least doubtful, about the text and its real impact on the most evident problems of the European Union.[28]

Also from this point of view, although the book illustrates a great variety of positions, it does not generate a lack of coherence between the different contributions, and this is indeed another reason to enjoy reading the book, which should definitely be purchased.

To conclude, the book reaches an important goal: it favors the circulation of German scholarship ideas on European Constitutional Law issues and in doing so, it trespasses linguistic barriers, achieving a fundamental cultural function.

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[26] *Id*., 761.

[27] *Id*., 802.

[28] See for example the essays of Haltern, Möellers and Kirchhof.

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Five years since its first publication, the book contains many elements of interest, a fact which is also explicable thanks to the strong continuity between the Constitutional Treaty and the Lisbon Treaty. In a recent book, Jacques Ziller,[29] among others, stressed this point. Unfortunately, while there is no room here to discuss this point, there is huge debate in the literature about such continuity after the signing of the Reform Treaty. As the disappearance of words such as "constitution", "law", "minister" indicates, the Reform Treaty seems to renounce that symbolical dimension stressed by Haltern.

Another relevant element of the volume is the idea that a European Constitution does currently exist. This point is also present in many ECJ's judgments, the *Kadi*[30] judgment being one example. The constitution seems to be the outcome of a process of steady comparison between the national and supranational principles, which follows a dialectic route and in this sense we can say that it is a dynamic constitution. In this constitutionalization process a central role is played by judges interpreting such principles: despite the so called "constitutional failure" and the consequent lack of a written constitution the vitality shown by the judicial formant[31] demonstrates the possibility of conceiving of a European constitutional law as a phenomenon moved by 'unwritten' forces.

[29] J. ZILLER, *IL NUOVO TRATTATO EUROPEO* (2008).

[30] ECJ, Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. European Council*, 2008, not yet published: "Fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories.... It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty".

[31] "The term 'formant' comes from phonetics, and a legal formant is the body of rules and propositions that contribute to "forming" the legal system. Without establishing any hierarchy between them, the comparativist studies the relevance of the legislative, scholarly and jurisprudential formants, along with constitutional conventions and interpretative usages, etc. Naturally, the number of legal formants and their comparative importance vary enormously from one legal system to another.' Alberto Vespaziani, *Comparison, Translation and the Making of a Common European Constitutional Culture* 5 *GERMAN LAW JOURNAL* 547, 563 (2008), available at http://germanlawjournal.com/index.php?pageID=11&artID=955. The term 'formant' was introduced by Rodolfo Sacco (*Legal Formants: A Dynamic Approach to Comparative Law American Journal of Comparative Law* 1 (I) (1991) 39; Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law American Journal of Comparative Law* 343 (II)' (1991) 39).