Book Review – Häberle and the World of the Constitutional State

By Florian Hoffmann

Review of *Die Welt des Verfassungsstaates - Erträge des wissenschaftlichen Kolloquiums zu Ehrem von Prof. Dr. Dr. h.c. mult. Peter Häberle aus Anlass seines 65. Geburtstages* (Martin Morlok ed.) [The World of the Constitutional State - essays in honour of Peter Häberle presented at a colloquium for his 65th birthday] (Baden-Baden: Nomos Verlagsgesellschaft, 2001, € 46.00, ISBN 3-7890-7494-2).

"If we have seen further than others, it is, if anything, because we stand on the shoulders of giants." This favorite saying of the great German constitutionalist Peter Häberle at once expresses his modest personality, as well as what is, perhaps, the core insight of his voluminous *oeuvre*, namely that constitutions and constitutional law cannot be understood through the narrow perspective of abstract legal logic, but only as a multi-faceted cultural phenomenon which needs to be studied by a constitutional jurisprudence that sees itself as nothing less than a 'cultural science' - "*Verfassungsrecht als Kulturwissenschaft.*"[1] The collection of articles in the book *Die Welt des Vefassungsstaates* gives us a taste of the multi-tonal echoes, to use a musical attribute, another great passion of this thoroughly 'cultured' legal scholar, which his manifold developments of this central idea have triggered. Even though it is but a short and eclectic glance at the impact his more than thirty books and, in all, well over 400 articles and reviews have had in Germany, Europe, and the wider world, the book's underlying, if implicit, purpose clearly is to show that Häberle is now himself to be counted among the giants. As such it is a welcome and important contribution to the reception and development of Häberleian thought.

[1] *See*, *inter alia*, the gigantic 2nd edition of his *Verfassungslehre als Kulturwissenschaft*, (Baden-Baden: Nomos Verlagsgesellschaft, 1998). For the still most comprehensive attempt to explore the roots of the ancient formula of 'standing on the shoulders of giants', see, of course, Robert K. Merton, ON THE SHOULDERS OF GIANTS. A SHANDEAN POSTSCRIPT. With a foreword by Catherine Drinker Bowen (New York: Free Press 1965). 'OTSOG' was translated, among others, also into German: R.K.Merton, AUF DEN SCHULTERN VON RIESEN. EIN LEITFADEN DURCH DAS LABYRINTH (Frankfurt: Syndikat 1980).

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Unfortunately, however, its content and structure do not quite manage to escape the quandaries of the notorious, often infamous, and so quintessentially European *Liber Amicorum*, or, indeed, the even more quintessentially German *Festschrift*. Although it, perhaps self-consciously, avoids calling itself a *Festschrift* and though it is, unlike many other 'in honour of…' collections which often seem both hastily written and hastily assembled, based on a well-planned 'real-life' academic workshop on Häberle,[2] the collection nonetheless suffers from the ambivalences typical of such publications: though their purpose is, as the book's editor, Martin Morlok, emphasizes in his preface, to honor a scholar through scholarship, most contributors, being close friends and/or colleagues of the honoree, as well as constrained by time and space, do not clearly present the state-of-the-art of contemporary constitutional law, or indeed, of Häberle reception, but rather summaries of their current work, enriched by often duly flattering, yet, at times strained references to Häberle's thought. Though many if not all of the thirteen substantive essays collected in this volume are interesting and insightful, they lack the thematic coherence and critical dialogue that would have made the book, as a whole, a truly scholarly contribution to the 'cultural approach' to constitutional law. Its ambivalent character is underscored by the inclusion of, at times, very shorthand accounts of the discussions, slightly longer 'replies' by Häberle himself which, however, mostly recount his relation to the contributors, and three, albeit excellent and moving, 'personal' *laudationes* by Michael Stolleis, Helmut Schulze-Fielitz, and Hans Maier. This, at best, mixed 'scientific' *Ertrag*, i.e. result or product, to which the book's subtitle refers, is, of course, neither the fault of the individual contributors, nor of its editor, since both have been constrained by the inherent limitations of the *Festschrift* model, an academic form which, as one Anglo-American librarian put it, escapes "full bibliographic control" and often buries occasionally brilliant essays in a somewhat wooden frame. A pity, thus, that the colloquy's organizers and, indeed, Morlok, could not, or would not opt for one of two alternative forms for celebrating Häberle's thought: one would have been a truly scholarly engagement with Häberle along the lines of the 'critical perspectives' collections common in many social sciences, though not (yet) in law. The other would have been something of a hermeneutic *séance* of Häberle and his friends on past and future meanings of 'constitutional law as a cultural science'. *Die Welt des Verfassungsstaates* contains elements of both these alternatives, but it does not pursue either one coherently, and, thus, lingers somewhat in mid-air, leaving it to the reader to unearth (or not) the many gems of constitutional scholarship contained in it.

[2] Held on May 13th and 14th, 1999, around Häberle's actual birthday, as the second of the *Baden-Badener Gespräche.*

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The structure of the book, which, of course, follows that of the colloquy, does not help in the latter venture. The titles chosen for the three podium discussions included: "The Legal Order of (Domestic) State Responsibilities: Pluralism and Coordination of Constitutional Levels" [*Die Rechtliche Ordnung der (staatlichen) Aufgabenwahrnehmung: Pluralismus und Koordiation der Verfassungsebenen*]; "Unity and Plurality of a European Constitutional Culture" [*Einheit und Vielfalt der Europäischen Verfassungskultur*]; and "Culture-specific Patterns of the Constitutional State: the Western Model of the Constitutional State in Different Cultural Contexts" [*Kulturspezifische Muster des Verfassungsstaates: das westliche Modell des Verfassungsstaates in unterschiedlichen kulturellen Kontexten*]. These topics were hardly coined to raise the (constitutionally) dead and do not clearly express the grand Häberleian themes they evidently are meant to treat, namely the instantiation of 'constitutional law as cultural science' on three analytical levels: that of the domestic, and in Häberle's case, German- constitution; that of 'Europe'; and that of the wider world. As a consequence of this lack of a coherent structure, the individual essays grouped together in each panel starkly diverge in style and content, ranging from reception histories via comparative constitutional law and history, to the speculative reflection on new forms of constitutional regulation. Though this heterogeneity duly expresses the diversity of Häberle-inspired scholarship, it also somewhat obscures the way the different essays explore Häberle's common themes and contribute to their exploration and development. Much can, nonetheless, be discovered.

The most pervasive theme raised by *Die Welt des Verfassungstaates* is, of course, Peter Häberle himself. The presence, both on the panels, as laudatores, and in the audience (and, thus, in the book) of a good part of the 'good and beautiful' of German and (continental[3]) European constitutional jurists is an impressive testimony to his standing and reputation in the discipline.[4] And this although Häberle's thought can hardly be considered as mainstream, even if his prolific exploration of the *geisteswissenschaftlicher* (spiritual/humanist scholarly) approach has contributed much to (almost) turning it into a 'canonical' ingredient of the jurisprudential mainstream. The core distinction to the latter is, perhaps, as Michael

[3] There seems, indeed, a strange neglect of Häberle in the Anglophone world, with comparatively few of his texts translated into English and also no representative of the common law tradition present at the colloquy; this despite his proximity to aspects of the analytical tradition, most notably critical rationalism, and, generally, an approach to legal hermeneutics that should be quite amenable to Anglo-American jurisprudence.

[4] Next to the substantive contributors and 'official' laudatores (as mentioned throughout this review), the general discussion was led, *inter alia*, by Friedhelm Hufen, Thomas Fleiner, Max-Emanuel Geis, Hasso Hoffmann, Jürgen Schwarze, Hans Zacher, Erhard Denninger, Hans-Peter Schneider, Wolfgang Graf Vitzthum, Alexander Blankennagel, Dian Schefold, Dieter Grimm, Rupert Stettner, Klaus Vogel, Lothar Michael, and Pedro Cruz Villalon. Sadly, one must remark the total absence of female scholars.

Stolleis puts it in his brilliant *laudatio*, that the two great antagonists of German constitutional law in the first half of the 20th century, namely Kelsen and Schmitt, have not meant much to Häberle. Instead, through his immediate teachers and colleagues such as Werner von Simson, Horst Ehmke, Ulrich Scheuner, Josef Esser, Günther Düring, and, perhaps most importantly, Konrad Hesse, he posits himself ultimately on the shoulders of two other Weimar icons, namely Rudolf Smend and Herman Heller, preferring their complex conceptualization of constitutionalism, through terms and concepts like 'structure', 'meaning frameworks', 'life', 'interaction', or 'integration'. In preferring these themes he rejected simpler ones along the lines of either 'norms' or 'power'. As such, Häberle's methodological vision has always gone beyond the logical games of his more resolutely positivist peers within the narrow legal culture, and he has not shied away from taking a definite stance and elaborating that stance in all its facets. Konrad Hesse hints in his introductory note that with his 'new method', Häberle might be a contemporary *pendant* to the great Weimar constitutionalists, whose greatness was shaped by the fierce struggle over the soul of that republic. The uncertainty over its deeper meaning brought into constitutional law both intra-disciplinary contest and extra-disciplinary significance creating, perhaps, a lengthy, and ultimately failed constitutional moment;[5] turning constitutional law into a leading social science. Hesse implies, of course, that with the political-legal stability of post-War democracy, the era of great constitutionalists has also ended, and one is led to speculate that, had Häberle been a Weimarian jurisprudent, he might not only have lived through professionally more eventful and 'interesting' times, but he also just might, together with a democratically reformed Smend, have given the necessary momentum to a constitutional third way in the deadlocked 'positivism struggle'.

Yet, (professionally) born, instead, into the, at times, tedious and technocratic stability of the *Grundgesetzstaat* (state under the Basic Law), Häberle has far from resigned himself into a career as a canonical apologist of the present order. For that he is too much what he describes through a metaphor from his native region of Swebia, a *Lumpensammler* (a 'rag collector') who, in Jose Joaquin Gomes Canotilho's interpretation in an excellent review of Häberle's *Europäische Verfassungslehre in Einzelstudien* ['European Constitutional Doctrine in Case Studies][6] which was, fortunately added to the present volume, skilfully weaves together the bits and pieces left not just by the giants (and dwarfs) of his discipline, but also by all other disciplines, and, indeed, by all concerned actors, subsumed under the broad heading of 'culture'. And it is through such 'rag collecting' that, as Stolleis points out, Häberle has perceived keener than others that the democratic paradigm of

[5] *See*, Bruce Ackerman, *We the People* (2 vols, Cambridge: Harvard University Press, 1998).

[6] Baden-Baden: Nomos Verlagsgesellschaft, 1999.

post-War Germany and Europe means more than just an alternative normative order, one that could be processed in much the same way as its different predecessors; democracy entails for Häberle that the constitution does not merely unilaterally emit democratic norms into state and society, but that it is self-reflexively part of the democratic process, providing the means for its own continuous interpretation and modification. Häberle's best known, and, arguably, most radical corollary from such 'taking democratic constitutionalism seriously' is, of course, that the latter is essentially incompatible both with the rigid functionalism of the old state-centered doctrines, as well as with an interpretative monopoly of jurists. Instead, it is the *offene Gemeinschaft der Verfassungsinterpreten* (open community of constitutional interpreters), and generally, the *offene Verfassung* (open constitution) which follow from the concept of the democratic constitutional state, a proposition the radical core of which has, up to this day, only been insufficiently explored. There are, thus, as again the ever perceptive Michael Stolleis remarks, clear parallels between Häberle and, among others, critical social thought, especially with the second, post-Marxist Frankfurt School and most notably Jürgen Habermas, both with regard to their, in essence Kantian effort to conceive of a constitution in which human beings can recognize themselves as at once its authors and its subjects, as well as in terms of their general 'crusade' to salvage modernity under conditions of post-modernity. Yet it would be mistaken to view Häberle as a real or potential 'critical legal scholar', in the same sense as it would be erroneous to confuse Häberle's 'cultural science' with the field the Anglo-American academy calls 'cultural studies'. The core difference is that Häberle has always remained within the 'internal' legal perspective of the 'law is' rather than the 'external' social-theoretical reconstruction of the 'law as'; the 'open constitution' is precisely not the substitution of constitutional law by constitutional politics or, indeed, an all-encompassing 'Culture', but an expanded conception of law.

The methodological core of that conception is, arguably, Häberle's consistent comparativism, an approach already inherent in his *Lumpensammler* paradigm. And it is through this comparative attitude that Häberle manages to locate what he sees as the contemporary equivalents of Weimar's constitutional moment: in essence, the challenge of contemporary constitutional law is to work out what democratic constitutionalism means under the conditions of three core processes, described by Hesse as the functional change of modern statehood, Europeanization, and internationalization/globalization. Against what Paolo Ridola calls the "technicistic reduction of constitutional doctrine" at such time of profound changes, Häberle advocates an active engagement with these challenges to traditional conceptions of the constitution, the state, and citizenship. Indeed, to some extent, Häberle's work can be seen as an incremental questioning of the presumed unity of these three key notions, and an exploration of alternative conceptions. The deeper merit of the present collection arguably is that it brings together scholars who, in one way or

another, have heeded Häberle's call for constructive engagement and have taken up his ideas to reflect on democratic constitutionalism on three levels: on the domestic (German), on the European, and on that of the (non-European) wider world.

On the domestic level, Eberhard Schmidt-Assmann [*Privatrechtliche und offentlich-rechtliche Gestaltungsformen (staatlicher) Aufgabenwahrnehmung: das Beispiel des Wissenschaftsrechts*], Jörg Paul Müller [*Subsidiaritat und Menschenrechtsschutz*], and Miroslaw Wyrzykowski [*Die neuen Osteuropaischen Verfassungen - eine neue Verfassungskultur ?*] reflect through the respective examples of the German *Wissenschaftsrecht* ('science law'), subsidiarity in human rights law, and the domestic constitutional experiences of the new central and eastern European democracies on what constitutionalism means when traditional state law is on the retreat even within the state. Schmidt-Assmann takes up Häberle's theory of constitutional pluralism to sketch a new paradigm for 'science law', and, implicitly it would seem, for domestic law in general, based on the 'regulated self-regulation' of what amounts to hybrid public-private entities such as universities. Perhaps Schmidt-Assmann's core point is that legal pluralism should not be misunderstood as mere experimentalism or 'alternativism', but rather that it involves a fundamental change of legal paradigms, from state-centred, unified and hierarchical to hybrid, fragmented and horizontal, from the state as the Leviathan to the state as an institutional actor among others, from the constitution as the basis of the state to the constitution as the normative framework of institutional-legal pluralism. If this analysis deals with the vertical versus the horizontal dimensions of constitutionalism, Müller's reflection on the subsidiarity principle thematisizes the central versus the decentralized, peripheral dimension through the example of the different application modes of human rights law. Like Schmidt-Assmann, he engages in a de-mythologization exercise by showing that, when it comes to core institutes of justice such as human rights, subsidiarity or, indeed, the European Court of Human Rights' 'margin of appreciation', the subsidiarity principle is often an empty shell behind which a tendency towards centralized control is hidden. That centralized control, however, is usually justified in the case of human rights since the inverse of subsidiarity often applies: on account of their universalist core, they are better and more effectively protected centrally than by the smallest possible socio-cultural unit. Yet, again, center and periphery ought not to be seen as alternatives, but as simultaneous action levels; while the central national, federal, or supranational institutions exercise control over the core content of human rights, the respectively smaller, local and culturally embedded units play a role in concreticizing specific rights in their specific contexts and, it should be added, both action levels interact and 'perturb' each other mutually. Wyrzykowski, finally, reflects on the internal dynamics of the constitutionalization process, notably on the permanent tensions between political, legal, and economic systems which are not

yet fully mutually translatable and, indeed, may inherently contain at least aspects which will remain untranslatable into each others systemic logic, posing grave challenges to a nascent constitutional culture.

The European level, in turn, is, perhaps, where Häberle's scholarly heart has, not just of late, been beating most passionately. This is not surprising, since 'Europe', in the widest possible sense, is arguably his most 'natural' framework of reference, so much so that Paolo Ridola [*Das Wirken Peter Häberle's in Italien*] calls him a truly "European jurist". Moreover, the process of European constitutionalization is in many ways an extraordinary phenomenon for constitutional lawyers, since, in the absence of both European statehood and a unified European constitution, it is only through their conceptualizations that European constitutionalism becomes recognizable as such; as Canotilho fittingly paraphrases Richard Rorty, "European constitutionalism is a form of narrative in which we all are the authors of our possibilities, and the story-tellers our own history" [p. 238]. Yet not only is it a constitution in the making, but as such it must represent, in Häberleian thought, the archetype of constitutionalism, the essential object, relieved of all layers of petrification. The specifically 'European' contributions by Dimitris Th. Tsatsos [*Zum Prinzip einer gemeineuropaischen Verfassungsverantwortung - am Beispiel der Revisionsproblematik der Europaischen Vertrage*], and Wassilios Skouris [*Die kontinentale(n) europaische(n) Verfassungskultur(en)*], as well as recurrent references by nearly all contributors and discussants, and, of course, Häberle's own 'reactions' to the panels take up this idea and give ample testimony to the importance accorded to this 'meta-topic'. Skouris, a Judge at the European Court of Justice (ECJ), attempts nothing less than a short history of European constitutionalism, beginning with the Glorious Revolution and not, to Häberle's explicit regret, with the oldest, Atheneian roots, in order to outline the basic elements of the European constitutional culture. He emphasizes the Court's role in uncovering these elements through its inherently comparativist approach, and proposes to regard its jurisprudence as a stepping-stone towards a European constitutional culture. Tsatsos, in turn, analyzes through the development of the European legal order how two of the core elements of constitutionalism, namely the state and the constitution have become separated; indeed, Europe may well be in a process of ever-denser constitutionalization, without coming any closer to unified statehood. To Tsatsos, this de-linking of statehood and constitution is the core characteristic of 'Europeanization', and the European integration process should not be misread, or, indeed, strained to imply a statehood on the gradual demise of which it is precisely premised. In support of such comparativist-pluralist thought, Ridola, thus, calls for a recovery of the European '*ius commune*' and the reinstatement of a broken, pan-European academic solidarity, a proposal seconded by Häberle himself with reference to his well-known call for a *gemeineuropaische Hermeneutik* (common European (constitutional) hermeneutic).

Finally, as regards the wider-world context, Emilio Mikunda-Franco [*Der Verfassungsstaat in der Islamischen Welt*], Hisao Kuriki [*Der Verfassungsstaat in den ostasiatischen Traditionen insbesondere am Besipiel von Japan*], Francisco Balaguer-Callejon [*Der Verfassungsstaat im ibero-amerikanischen Kontext*], and Brun-Otto Bryde [*Der Verfassungsstaat in Africa*] show how the 'Western' idea of constitutionalism has unfolded itself in non-Western, highly diverse contexts. Of particular currency is, of course, Mikunda-Franco's analysis of 'Islamic constitutionalism' and his explicit treatment of the question of how, if at all, 'Western' constitutional ideas influence the different, in themselves highly heterogeneous Islamic societies. He identifies the different histories of Islamization as clues to intra-Islamic constitutionalism, and introduces the notion of a 'common Islamic constitutional law', in analogy to Häberle's respective European concept. The former is formally similar to the latter, though, on account of the absolute precedence of divine prescripts which are themselves interpreted only in a closed and casuistic manner, many substantive differences remain. Kuriki complements Mikunda-Franco by presenting a short constitutional history of Japan and the difficulties of generating a vivid and open constitutional culture there. Of particular interest is his assertion that the way to introduce 'Western' or 'European' constitutionalism into the potentially unreceptive Japanese society took place by means of the association of the culturally specific, namely here 'Europe' and 'European-ness', with the a-cultural, general and universal. This discursively transformed a perceived hierarchical relationship, between a developed Europe and an underdeveloped Japan, into a supposed community of destiny, a process not entirely uncommon in today's Europe. Balaguer-Callejon then describes the difficult constitutionalization processes of post-military Latin American societies which are, at once, deeply 'Western' and yet, as a result of structural inequalities and asymmetries, far removed from the 'Western' constitutional experience. For a long period, Latin American constitutions could only be called 'semantic' or 'nominal', being dead letters without any cultural anchoring; yet ever since the demise of the military regimes in the region, 'real', i.e. cultural constitutionalism is on the upsurge, transforming the societies in which it takes place, and gradually adapting its originally rigid, Euro-statist framework to the manifold pluralisms characteristic of Latin American states, and, thus, slowly establishing an 'other' Western constitutionalist tradition. Finally, Bryde, a justice of the German Federal Constitutional Court, rather brilliantly sketches the trials and tribulations of constitutionalism in Africa. He eloquently refutes the common myths about its frequent failures in the region, namely an alleged native 'incapacity' to implement 'Western' constitutionalism, a lack of democratic experience, and the ethnic heterogeneity of most African societies, and focuses on underdevelopment as the root cause. Although little headway has so far been made against the latter, Bryde emphasizes the most recent, not post-colonial, but natively grown wave of African

constitutionalism, which is much deeper embedded in the general culture and, thus, stands a much better chance to generate Häberle-type 'constitutional cultures'.

An important conclusion by all those contributors reflecting on constitutionalism in the 'wider world' was that there still existed a mental *Einbahnstrasse* (one way street) between the North/West and the South/East, with 'Western' scholars hardly ever accepting that the learning experience can be mutual. In Häberle's system, that, in Hans Maier's words, "G*randsegneur* of the open society", such 'one-way-street' thinking is not only lamentable, but fundamentally misses the point of the 'open constitution', i.e. one that only exists through the inter-action of interpreters on all levels and from all perspectives. Already in that sense alone, the central figure of *Die Welt des Verfassungsstaates* is a giant whose vision ultimately comprises the whole world and invites us to stand on his shoulders to explore the new horizons of a stateless, pluralist, multicultural and democratic constitutionalism. Martin Morlok's collection is, with all its shortcomings, nonetheless a good summons to this venture, to which, to close with the words of the wise Konrad Hesse, belongs the future.