

REVIEW ARTICLE

EUROPEAN CONSTITUTIONALISM AND NATIONAL IDENTITIES: THE NEED FOR A DEBATE

*Giacinto della Cananea**

Armin von Bogdandy & Jürgen Bast (eds.), *Principles of European Constitutional Law*, Oxford-München, Hart Publishing - Verlag C.H. Beck, 2010, 2nd revised edition, p. 806.

Diana-Urania Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study of the “Functionalized Procedural Competence” of EU Member States*, Berlin-Heidelberg, Springer, 2010, p. 145.

I

One of the most widely debated books on European Union law to appear in the last years has been the *Principles of European Constitutional Law*, first published in English in 2006 and which has now been published in a revised and widened edition. Since many books have been published on the public law of the EU, especially after 2000, three basic features of this book ought to be pointed out: whether it can be properly categorized as a textbook, the overall meaning of the project carried out under the leadership of Armin von Bogdandy, and the influence of German public law doctrines.

From the first point of view, as Anne Peters observed in her review of the original edition [A. von Bogdandy (Hrsg), *Europäisches Verfassungsrecht*, Heidelberg, Springer, 2003], the German publisher erroneously included this book in the category of “textbooks” [42 Common Mkt L. Rev. 861 (2004); Jost Dülffer called it a ‘*kompendium*’ in his review article, in 44 *Archiv für Sozialgeschichte*, 524, 553 (2004)]. It

* Professor of Administrative Law, University of Rome “Tor Vergata”.

is true, as the editors argue in their introduction, that there is not a single category of textbooks, but a variety, and that not all of them constitute “introductory work [...] addressed to the novice who seeks an accessible grasp on the topic” (p. 5), and are characterized by easy language and definitions. However, with its 800 pages, this book certainly differs from a concise “*précis*”, to mention a fortunate French literary species. Nor does it provide an easily readable summary of the state of the issues concerning EU law, as well as notions that can be immediately used for practical purposes. Indeed, as the editors recognize, the book is concerned, rather, with theoretical and doctrinal questions. Moreover, unlike not only textbooks but also most treatises, this book offers very differentiated points of view about the same reality. Consider, for example, the essays written by Paul Kirchhof and Manfred Zuleeg on the “European Constitution”. Consider also Cristoph Moellers’s essay on the concepts of *pouvoir constituant* and constitution. Whatever the intellectual and political soundness of the institutional project that began with the Laeken Declaration and failed in the last decade, such essays provide the reader not only with “contending visions” of European integration, but also with a variety of insights into the possibility to give effect to the basic principles of constitutionalism beyond the Nation-State and, therefore, to lead to a transplant of those concepts. Precisely for this reason, the book is particularly helpful for doctoral studies.

It is very helpful also because it devotes considerable attention to issues that often are not adequately considered by legal analysis. This applies to von Bogdandy’s essay on the “Founding principles”, which opens Part I, and to Ulrich Haltern’s essay “On finality” (of European integration), which concludes it. While Part II, which covers institutional issues, is more in line with traditional approaches (it ought to be mentioned, however, that the chapter written by Jurgen Bast on legal instruments has been enriched with a discussion of remedies, in addition to Franz Mayer’s analysis of multilevel constitutional jurisdiction), part III deals with a wide range of issues concerning the legal position of the individual. It considers both the status of EU citizen and the fundamental rights and freedoms recognized to every person. Once again, the analysis is not limited to the rules of law and the operating mechanisms, but is completed by a solid analysis of the underlying theoretical constructs and is, thus, likely to draw the attention especially of those continental lawyers who are interested in the traditional structures of public law thought. A different perspective is offered by Part IV, which deals with the

constitution of the social order, with an interesting distinction between the economic constitution (Armin Hatje) and the labour constitution (Florian Rödl). Finally, part V adds to the contending visions of European integration proposed by Kirchhof and Zuleeg, Ulrich Everling's study of the EU seen as a "federal" association of states and citizens.

II

The second basic feature of the book emerges from the short description just carried out: all the essays have been written by a group of German scholars (and one from Austria) who belong to different academic generations and express a variety of opinions. From this point of view, it is questionable whether it is correct to say that the book was written by "younger scholars", as Anne Peters did in her review (though she specified that the authors "had already excelled in the concrete and specific fields" covered in the book) or that it involved the participation of "the principal actors of Germany's next generation of European lawyers", as Daniel Thym suggested in his review of the first English edition of the book [44 Common Mkt L. Rev. 837 (2006)]. What really matters is not the age of the authors (*tempus fugit...*). It is the fact that this book is not simply the product of a group where most of the actors are either a pupil of the leading figure or a colleague in the same university. This book was, rather, supported both by distinguished scholars and former judges, such as Kirchof and Zuleeg, and a number of younger academics who excel in a variety of legal fields and work in several German universities. Whether, and the extent to that, such group may either be regarded as a fairly distinctive group or as a representative group of the Austro-German tradition [as suggested by Massimo Panebianco in his review of the German edition, in 41 *Diritto comunitario e degli scambi internazionali*, 642 (2003)], it remains to be seen. However, the book can properly be regarded as a major contribution of German scholarship in the field of EU law and the influence of the ideas expressed therein is likely to be widely felt.

In order to clarify this feature, a parallel may perhaps be made with Vittorio Emanuele Orlando's treatise of administrative law (*Primo Trattato Completo di Diritto Amministrativo Italiano*, edited in several volumes during the first two decades of the twentieth century). Since 1881, Orlando had a very clear project, that is to say the building of a "new public law". He did not mean simply to provide a full coverage of the fields of public law that arose in connection with the widening of the

electorate. He meant to replace existing doctrines of public law, because they were – according to Orlando – conceptually unsound and insufficiently “legal”, due to the excess of sociological and philosophical elements, with new doctrines. German public law doctrines, with their strong emphasis on the supremacy of the State over citizens and territorial authorities and their solid base in post-pandect legal theory, were at the base of his attempt. That attempt succeeded, due to Orlando’s talent as a leader. Some scholars of his generation and virtually all the best scholars of the next generation contributed to his treatise. The importance of that treatise did not depend so much on the variety of fields that it covered, but, rather, on the use and crystallization of “the” legal method, in itself a very questionable approach, though a very productive one for some years [as I pointed out elsewhere: G. della Cananea, *On Bridging Legal Cultures: The Italian Journal of Public Law*, 11 *German Law Journal* 1281-1291 (2010)].

III

This leads us to the third, and by no means the least important, feature of the book edited by von Bogdandy and Bast, that is to say the strong influence played by German public law doctrines. A first problem is that such doctrines, especially when dealing with sovereignty and constitutions, are overly conceptualistic. The question thus arises whether such doctrines can really be helpful to re-orientate the focus of EU public law from theoretical concerns and towards an examination of the powers and functions of public authorities in the light of the principles of transparency and participation which Armin von Bogdandy examines in the first essay of this book. A work on legal protection of individuals should also look more deeply at the procedural aspects of good administration, especially as these feature most prominently in recent developments of EU law, both in judicial decisions and in the recent codes of practice.

Another question is whether the legal approach to the study of constitutional law, that characterised German doctrines, make them more suitable for the EU than others, such as the less recent English doctrines of public law that put so much emphasis on the “political constitution” [the best account is still that of Martin Loughlin, *Public Law and Political Theory* (1992)], or Italian and Spanish views of constitutional law as inherently “political” [see Claudio Martinelli, *Gaetano Mosca’s Political Theory: a Key to Interpret the Dynamics of the Power*, 1 *It. J. Public L.* 67

(2009)]. A formalized legal approach may be more suitable for the study of constitutional adjudication, but not for other important aspects of a polity, for example the organization and functioning of political parties. Nor does it look the most suitable approach for the study of some specific features of the EU, such as the economic and monetary union, with its strong connection with economic science (as observed by Hatje, p. 590).

Finally, the question arises whether this book may contribute to the evolution of a common legal culture in Europe. It ought to be said since the outset that in this specific area there is both a strong tradition of studies of legal culture and a tradition of learning from what has been done in other European countries. The study of legal culture within the European Union as such, instead, has started very recently. We may even ask whether there is such thing as a European legal culture, seen as distinct from the Western legal tradition [as identified, for example, by J. M. Kelly, *A Short History of Western Legal Theory* (1992)]. We may ask, moreover, whether a European legal culture may flourish only through common enterprises, as opposed to the products of 'national' cultures. The fact that this book brings these problems within the current debate is a considerable achievement and confirms, in my opinion, that this is a solid and outstanding work in a crowded field.

IV

Unlike the other book, that written by Diana-Urania Galetta (which is not simply a translation, but a revised edition of an essay first published in Italian: *L'autonomia procedurale degli Stati membri dell'Unione europea: Paradise Lost? Studio sulla c.d. autonomia procedurale: ovvero sulla competenza procedurale funzionalizzata*, Torino, Giappichelli, 2009) is a monograph. It has a well defined object - the principle of procedural autonomy of EU member states. However, as we shall see later, the conclusions reached by the author may be combined with those of the book edited by von Bogdandy and Bast, confirming the importance of constitutional and administrative law approaches in order to shed light on the dynamics and tensions of public law.

The book starts with an analysis of the notion of 'procedural autonomy'. This is a very good methodological choice for two reasons. First, even a rigorously empirical analysis of phenomena, observable in the real world, requires at least an idea of that kind of phenomena. Second, most doctrinal works on this topic focus analytically on the evolution of the case-law of the European Court of Justice, and take for

granted the notion of procedural autonomy. This notion, according to the author, is a sort of synthetic way to refer to the ‘autonomous choice of the means’ through which the Member States exercise their competence to ‘sanction’ the respect of EU law. Of course, although much ink has been spilt by judges and lawyers in the attempt to separate questions of process and substance, the attempt can never be fully successful because those questions are hardly separable. Indeed, although the notion of ‘procedural autonomy’ suggests that the ECJ is willing to defer to the substantive choices made by national governments and parliaments, its review has cast limits on the permissible choices made by national institutions.

That said, Galetta is well aware of this problem. And she convincingly argues that the concept of (procedural) autonomy has, *inter alia*, a clear advantage, since it may express also the external limits inherent in the competence enjoyed by the Member States (as Remo Caponi has pointed out in his review of this book published in the *Rivista trimestrale di diritto e procedura civile*, 2010, n. 3, p. 1105). Such external limits are effectiveness and equivalence. While effectiveness derives from the need to ensure the *effet utile*, as the ECJ has held since its celebrated judgments in *Van Gend es Loos* and *Costa*, equivalence had a more complex evolution. Initially, the *Saarland* ruling stated that in the absence of Community rules on a specific subject, it was for the domestic legal system of each Member State to determine the protection of the rights which citizens have from the direct effect of Community law, unless procedural rules were either less favourable than those governing similar domestic actions or rendered virtually impossible or excessively difficult the exercise of rights conferred by Community law. In later rulings, including *Factortame* and *Francovich*, the ECJ has deferred much less to national choices, with the effect of promoting a more uniform interpretation and eroding national procedural autonomy.

This shift, pointed out at the end of the first chapter, is confirmed by the analytical study of the case-law that is carried out in the second. The material covered in this chapter is very familiar to those who follow the case-law of the ECJ and who read the literature published in the last years. The material is clearly and thoroughly presented. But the strength of the work lies in the analysis of the trend as well as of its implications. Not only has the case-law gone well beyond the *Saarland* ruling, but the standards of procedural justice have been levelled in a way that would have been unthinkable some decades ago. Recent judgments of the ECJ,

for example in *Kapferer*, imply that even fundamental legal principles such as that of *Res Judicata* must be reconsidered in the light of EU law.

The third chapter considers both the causes and the effects of such trend. The author convincingly demonstrates that the evolution of the case-law of the ECJ would have been impossible without the growing activism of national courts, through the preliminary reference procedure, often ‘unnecessary or tailor-made’ (p. 115). To take a concrete case, Galetta examines public procurements, an area where procedural autonomy was increasingly limited, although there is not a full competence of the EU in this respect, but only that to remedy differences between national rules that may harm the functioning of the common market. She comes, therefore, to the conclusion that the influence of ‘the EU towards a partial harmonization of the national procedural systems is undeniable’ (p. 115). It is a pity that the concluding section of just three pages is too brief to give us not simply a synthesis, but also at least a sketch of a more theoretical approach concerning the ‘broader framework of relationships between legal orders’ (p. 121). If the external limits have reduced the (procedural) autonomy of the Member States, the question arises whether the concept of autonomy must be revised. A key to understand it may be offered not only by the growing body of literature on legal pluralism within the EU, but also by less recent studies, particularly that of Santi Romano [*L’ordinamento giuridico* (1946, 2nd), recently republished in French].

V

Galetta’s metaphor of the ‘lost paradise’, which conveys the idea that national competence has been ‘functionalised’ by the EU, raises also another interesting question, that is to say whether the process of “constitutionalisation”, whereby EU law can penetrate the area of procedures previously regarded as a province of national legal orders, is unlimited. She rejects the ‘criticism of certain scholars heavily attacking the ECJ’ [particularly Carol Harlow, *Voices of Difference in a Plural Community*, 50 Am J. Comp. L. 339, 2002] as ‘somewhat out of place’ (p. 116). The reason is, according to Galetta, that national legal systems are ‘necessarily broken down’ in a new system of legal sources.

What is at issue, however, is not simply whether national legal systems are not anymore to be regarded as separate and ‘closed’ to external influences. This is recognized by all national higher courts, as well as by most, if not all, scholars. What is really at issue is, rather, whether the

functionalist process of “constitutionalisation”, carried out by the EC/EU may be regarded as unlimited. The use of framework directives, that left enough room to national implementing rules, could be viewed as a method of efficiently allocating legislative tasks. By relieving the ‘legislator’ of the EC of responsibility for details, this could concentrate on major issues. Furthermore, national legal orders could deal with matters of detail and find an appropriate balance between what Edmund Burke called the two great principles of conservation and innovation [*Reflections on the Revolution in France* (1790)]. Whether a single court of law, though connected with national courts, is aptly equipped for the task of rationalizing national systems is questionable, to say the least, from an institutional point of view.

It is questionable also for another reason, which emerges from Armin von Bogdandy’s essay on the “Founding Principles” of European constitutional law. He does not only observe the diversity of national constitutions, though there are some common traditions, but he also argues that a ‘principle of homogeneity could scarcely be justified (p. 40; see also A. von Bogdandy, *The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship*, 19 Eur. J. Int’l L. 249 (2008)], especially in the light of Article 4(2) TEU’ according to which the Union ‘shall respect the equality of the Member States’, as well as ‘their national identities’. Individuating the meaning of ‘national identity’, of course, is not an easy task. However, if respect for national identity is a constitutional principle of the EU [as Francis Snyder, among others, argued: *The Unfinished Constitution of the European Union*, in J.H.H. Weiler & M. Wind (eds.), *European Constitutionalism Beyond the State*, 68 (2003)] and must, therefore, be taken seriously, it adds a further and more powerful arguments to the main argument which is often used against uniformity, that is to say the risk of precluding experiment. There is, too, a threat to differences, for example with regard to adversarial and inquisitorial procedures, that reflect a cultural variety, which ought not to be neglected. It is in this sense that a ‘substantive’ limit to the erosion of national procedural autonomy may, and perhaps should, be found.

Finito di stampare nel mese di dicembre 2011
dalla Cangiano Grafica - Napoli

