

BOOK REVIEW

Armin Von Bogdandy & Jürgen Bast (2007) *Principles of European Constitutional Law* Oxford: Hart Publishing

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This is a massive book and, unusually for English books, relatively reasonably priced. It seeks to demonstrate that there is much to be gained from treating EU primary law as constitutional law. The focus is essentially on the evolution of German legal studies and the doctrines these have developed on European constitutional matters. At the same time the book is also concerned with elaborating new strategies for German legal research. The book also points to the influence of German *ordo-liberal* thinking on EU debates. All of this is documented in great detail both in the text proper and in the exhaustive footnotes. Thus a good deal of attention is given to emerging theories of rights, of instruments and of federalism amongst other things. Comparisons are also drawn between the EU today and the German Confederation of the late 1860s. In both cases the argument is that the executive branch has been strengthened by the creation of the new regimes.

Interestingly, there is one chapter, by Antje Wiener, which points in another direction. She calls into question what she sees as the rigidities of the German legal tradition with its methodological nationalism. Instead she urges the use of more flexible, Anglo-Saxon inspired, political science approaches in understanding EU constitutional developments. Elsewhere it is suggested that the German approach has difficulties in coming to terms with the consensus politics of the EU. But generally most contributors prefer to stick to a German perspective.

After very detailed contents lists and a series of tables (of cases, treaties, legislation and national constitutions) the book has 19 chapters. These are all written by well respected German authorities. As they come from a variety of schools they do not present a uniform view on the nature of the EU and its constitutional dimension. Some of their contributions have already appeared in other guises and places.

The chapters are divided into five sections of slightly unequal length. These are devoted to definitions, institutions, individual rights, economic aspects and competing visions respectively. Obviously it is not possible with a book of this size to comment on, or even list all of these. However, the first section includes studies of EU constitutional principles, federalism, national attitudes to primacy and the constituent power while the second deals with political institutions, instruments, courts and competences. The third covers rights and freedoms as well as citizenship as such while the fourth section looks at economic structures and competition law. The final section considers EU relations with member states, finality, the EU as a union of states and the advantages of constitutional provision. There is also a brief, and far from comprehensive, index.

Not surprisingly for a book on constitutional law, there is a good deal of thought in all this about what is meant by a constitution and whether the EU has, or indeed, needs one. In fact a constitution is seen as an ambiguous concept, capable of theoretical,

normative and descriptive understandings according to Möllers. Wiener prefers Snyder's fourfold definition. The book also assumes that the EU has an economic constitution as well as a politico-legal one. The latter, for Von Bogdandy and Drexel, is based on the principles of equal liberty, the rule of law, democracy, solidarity, loyalty and diversity but not on integration or supranationality.

However, not all the contributors agree that the Union needs a new constitutional document. Zilg thus argues strongly that the Union already has a constitution. Others support him. The suggestion is also made that European citizens ought, already, to be able to bring cases for unconstitutional behaviour to the ECJ. Equally, Hatje argues that the economic constitution already exists and is based much more on the free market than is the Grundgesetz. Competition law is therefore a part of it and needs to be considered as constitutional law.

There is also a good deal of stress, notably by Weiner, on the successful and on going process of constitutionalization. She sees this as going through three stages, of integration in the early years, Europeanization in the 1980s and now politicization. Grabenwarter reinforces this by saying that there is a slow process of reciprocal linking of constitutions with the Union, one of a number of reference to ideas of multi-level governance, although Mayer expresses some doubts about the MLG concept. Obviously these processes suggest that it not really necessary for the EU to seek a new constitutional foundation. In fact, Oeter goes further and argues that there is no need for a revolutionary act of constitutional creation, something for which there is anyway, for Möllers, no constituent authority, whereas there are conflicting norms to be considered. Gradualism, it is implied, is to be preferred. Moreover, in Wittzack's view in looking for a new constitutional foundation the EU is trying to preserve a conception of its own sovereignty which has been outgrown by nation states.

In any case, Oeter also argues strongly against creating a state like structure for the EU. He insists that the EU is and must remain consociational, consensual and federal. And, for him, being a federal polity does not mean it is a state. For Dann, moreover, the EU is actually an example of executive federalism involving both the member states and semi-parliamentary democracy. Zilg argues that federalism must not be seen as an eschatological category, something which is disappearing, but as a federative principle which is essential to the working of the Union.

Unsurprisingly, only a minority of the contributors express appreciation of the 2003-2004 Constitutional Treaty or believe it will change things for the better. Thus Von Bogdandy believes it will come into effect. Others consider that it could help to reduce the tension between Union and member states by underscoring the latter's sovereignty and enhancing subsidiarity. The fact that it makes the Charter binding is also welcomed. For Kühling this is more important than any new constraints which it imposes on the Union.

However, the majority are much more doubtful. Thus, on subsidiarity, Kirchhof argues that the draft is uncertain and even threatens to undermine the EU as a *staatenverband* by the way it reinforces states. Möellers also argues that it will not provide democratic legitimacy. In any case, for Kirkhof, thanks to its insistence on conferral of power by the member states, it cannot be regarded as a constitutional act. Its effectiveness is also questioned, Bast believing that it will actually increase, not reduce, the number of instruments and Dann that it will install a triple government system. In any case, Zilg, echoing Von Bogdandy's view of the ambiguity of the draft's conception of the EU's constitutional principles, is of the opinion that it does not achieve the level of clarity needed. Nonetheless, it neither shifts the Union's structure to that of a single state nor expands its competences, despite claims to the contrary in the text. Indeed, Haltern argues that it offers no clear sense of where the EU is going.

It follows from this that most of the contributors do not see the Union as a superstate. Here Kirkhoff points out that the EU is not a *verfassungsverband* but a polity based not on coercion but on the willingness of member states to integrate. So, while it may be state like, it is not a state, lacking dynamic competences as it does. Thus Haller makes much of the failure of the Commission's efforts to develop a European identity to support a state like idea of the EU.

And several contributors point out that member states remain powerful. Von Bogdandy & Bast thus argue that states, in conferring power on the Union, have not so much lost power as lost the capacity to determine their own powers. Similarly Everling points out that they are in an ambiguous situation. They have much latitude inside the Union even if their sovereignty has been limited by their subjection to the rule of law, thus setting up tensions with the Union which need to be handled with moderation and restraint. Law, moreover, has to be regarded both as a contract and as a means of holding the EU together.

Furthermore, he argues, the states' nominal support for European integration conceals both inertia and self interest. Others would stress national reservations about the defence of their rights by the ECJ. Thus Grabenwarter makes clear how differently, and with what reserves, the member states treat primacy. Generally therefore, the EU is seen as an unprecedented and polycentric body. As Everling says conceptions of the EU as a *zweckrational* economic association, a political *staatenbund*, a compound of constitutions or a federal structure are all too one sided.

Such cautious stances, which are slightly at variance with received views of German thinking on the EU in Britain, are one of the volume's main strengths. The book also provides some useful insights into constitutional understandings. Equally, many of the contributions provide thoughtful analyses and assessments, such as those of Dann on the EU's institutional structure. These will be of particular interest to English readers. And the book provides very detailed expositions of German legal thinking and case law, although the contributors are not afraid to question it.

However, it has to be said that there are also problems with the book. To begin with, although the fact that the contributors often take somewhat differing views is very welcome, it can also create difficulties. It means that there are perhaps too many angles and too little certainty. This makes it hard for the book to present a fully coherent view of what EU constitutional law is.

Secondly, although it has been translated, it still largely ignores Anglo-Saxon and other debates. And its treatment of the British case is often skimpy and faulty. Thanks to its omissions it gives perhaps too strong an impression of the essential difference of the British case. So its relevance to British readers is less than might have been. Moreover, the translations are of variable quality, so that some of the weakest chapters are extremely hard to follow, which is unfair both to writers and readers.

A third weakness is that, although the book was published in 2007, the text dates back to October 2004. And this shows. The reader is inclined at several points, to say "Yes, but what about...". Some pulling together of the threads and updating for the English edition would have been helpful here. There are also a number of overlaps which might also have been picked up in the final English editing. Lastly, the book does reflect what Möllers says is the German tradition, that is to see juridification rather than politicization as the mark of constitutionalization. So the politics of constitutional reform remains the spectre at the feast. Given present developments this is slightly unfortunate.

So the book is best regarded, less as a definitive and organised statement of what the principles of European Constitutional Law actually are and more as a series of contributions to working them out, cast in the form of essays on German constitutional thinking in the early years of the new century. As such lawyers will appreciate it, especially in its assessments of case law. General readers, however, may find it hard work to find the nuggets of insight sometimes concealed by the somewhat heavy style and approach. Both will probably use it as a work of reference, to be dipped into as needed, rather than read in full for its overall conception of EU constitutional law and its convincing demonstration that primary law should always be regarded as constitutional law.
