

Joakim Nergelius:

The Constitutional Dilemma of the European Union¹

Book review by **Angéla Juhász-Tóth²**

Joakim Nergelius, Professor of Law at the University of Örebro (Sweden) came up with the evergreen topic of the constitution, constitutionalisation of the European Union. The purpose of his monograph is to analyse the actual constitutional situation of the European Union. 'Actual' means in that case the end of 2008 and the beginning of 2009 when the future of the Lisbon Treaty was still unclear. We know already that the Treaty has entered into force but this fact does not affect the relevance of Nergelius's questions.

He analyses the topic from historical, theoretical and practical perspectives, and tries to find answers by examining some leading EU theorists (Weiler, Habermas, Scharpf, Majone). He focuses on the relation between the different EU institutions and the interests that they serve, as well as on the importance and impact of those relations for the relation between the EU and its Member States.

He intends to add new elements to the debates on current European constitutional problems, taking to account that his main objective is to suggest good solutions and remedies to actual problems. He questions the now mainstream or dominant critical line of thinking in EU law and some of its main assumptions. It is from a pro-integrationist point of view that he criticises many theories on European integration that are unable to offer constructive solutions to the main institutional and constitutional problems and challenges that the EU and the world seems to facing.

The book has three loosely connected main chapters. After the first purely introductory part, Chapter 2 deals with theoretical constitutional issues like subsidiarity and the division of power between the EU and its Member States, and also more theoretical topics like federalism, multi-level constitutionalism and the so-called European demos. Chapter 3 discusses a few of the important changes that the Lisbon Treaty contains, in areas which may also be of general, theoretical of constitutional interest. Chapter 4 is the main theoretical chapter, where the approach of analysing and criticising some leading scholars is followed. Finally the concluding

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² PhD-student of the Doctoral School of University of Debrecen, Faculty of Law.

chapter explores the author's main ideas and propositions on the European constitutional problems.

The starting point of Nergelius's argumentation is that the degree of legal, economic and political integration in the EU and the transfer of decision-making powers from the Member States to the Union has reached a level or stage where it is necessary for the EU to be perceived as a democratically and politically legitimate decision-maker, while at the same time the general acceptance of the Union as being such an actor seems to be alarmingly low among the European citizens. The current constitutional dilemma of the European Union is formulated in the following way: in order for the EU to be more democratic –as it is often accused by many of its critics for not being– and also for further enlargement to take place, further institutional reforms at the EU level are probably required. But those are exactly the kind of reforms that leading politicians in many or even most EU states will refrain from, having recent debates on treaty reform on mind, since the majority of EU citizens show a limited interest in such issues and politicians in general tend to be ever more unwilling to take risks and challenge huge voter groups.

As a theoretical point of departure Nergelius asks if there is a specific EU constitutionalism, and if so, which kind. The term constitution may be used for international organisations, not only for states of the traditional kind, the accomplished constitutionalisation of the EU being the proof for that. The traditional doctrine according to which constitutional law as a topic that deals with the constitution of independent states is thus definitely cannot be upheld. Acknowledging the level of EU constitutional law as a new set of constitutional norms, a number of new and complicated issues merit attention.

In Chapter 2 Nergelius examines some of them from the point of view of the multi-level constitutionalism, which means that the constitutional topics are discussed from other point of view and at other levels than the traditional, national one. According to the author there is today a real need for a partial redefinition of traditional concepts of constitutional law and constitutional theory. Clear evidence for that is the fact that European integration has altered our traditional concepts of sovereignty and other core constitutional concepts. He welcomes the ideas of Samantha Besson (theorization of the sui generis nature of European constitutional law and the simultaneous Europeanization of European constitutional theory), Miguel Poiares Maduro (constitutional pluralism) or L.F.M. Besselink (Composite European Constitution) because of their freshness and thought-provoking nature.

The legal and constitutional status of the EU is described by Nergelius stressing that the Union is not a state and does not work as one, and ought not to be compared with one another. It is another kind of entity altogether, but it is possible that the EU may be a model for other entities and may change the nature of international relations quite profoundly. The EU must be viewed and analysed not as a state in any traditional sense of the word, but as a federalised legal and constitutional entity quite of its own.

In Chapter 3 Nergelius analyses more in detail a few important constitutional issues of the Lisbon Treaty which are likely to affect the constitutional structure of the EU. First he touches on the new rules on treaty changes or amendments. In this respect he thinks that besides the increased future role of the European Council, the real dramatic change is the veto of national parliaments in the application of the so-called “passerelle” clause. This new rule though clearly differs from the current rules on treaty amendments, is quite undermined by the veto power, accordingly it is highly uncertain that this new mechanism will ever be used in an efficient way.

As far as the division of competences between the EU and the Member States is concerned the most important change is the codification the areas of exclusive competences for the EU and the shared competences. As for Nergelius this may be seen as a clear step forward for a federal entity such as the EU, where this basic fact concerning which competences exist and who may exercise them has so far only been possible to deduct from the case-law of the European Court of Justice (ECJ).

Regarding the relation between the core institutions Nergelius emphasizes the strengthening and reinforcement of the European Council. Contrary to the Council of Ministers which loses some of its institutional stability, the European Council gains a totally new position that it has never owned. He disapprove of the political compromise on the composition of the Commission which blurs (or we can say does not clarify) the distinction between European and national interest.

Nergelius generally doubts the real need for the Charter of Fundamental Rights, and as it is not integrated in the Lisbon Treaty, its legal status became unclear. As for the qualified majority voting, he shares the view that the new rules (which anyway will only enter into force in 2014) will enhance the powers of the Commission, and indirectly also the Parliament. Finally Nergelius addresses the question of “flexible integration”. He states that the issue of closer cooperation has gained substantially more attention in the doctrine than its practical importance has so far merited. It is a topic which triggers the imagination of constitutional scholars, and which makes it easy to speculate about the future directions of the EU. So far, however, not much has come out of it, and the Lisbon Treaty looks unlikely to change that fact.

At the beginning of Chapter 3 Nergelius -somewhat strangely- quotes Karl Marx referring to the attitude of many theoreticians to neglect real-world problems in favour of abstract theories and generalisations, with general solutions to a variety of problems, instead of more flexible and pragmatic or even practically useful answers to complicated questions. His main critic on the four deeply examined leading EU theorists is that they neglect certain problems, not seeing them in their full complexity or sometimes simply they come up with the wrong answers. All the sections of this chapter present the main ideas of the scholars, after which critical arguments take place.

First Joseph Weiler is discussed from two different points of view. The first is the question whether the process of constitutionalisation of the EU treaties due to the work of the ECJ would as its consequence have a kind of “statehood” as an end result. In fact it is the heated discussion

of Mancini and Weiler that is presented. Weiler sharply disagrees with Mancini's conclusion according to which the statehood is the logical consequence of the constitutionalisation, and the steps in a federal direction taken so far are not enough from legal point of view. In order to achieve full democracy a federal state is necessary. Weiler opposes this idea of European statehood and thinks that the non-democratic nature of the EU can be reduced within the current constitutional framework.

Weiler disbelief in further integration and criticism of actual integration are discussed in the second section on the idea of constitutional tolerance based on the lack of demos within the EU. For Weiler a federal state does not exist without its federal demos, which in Europe does not exist. Nergelius criticises Weiler for his tendency to involve religious ideas and some inconsistencies in his constitutional thinking, his often arrogant language. Weiler idealises the early phase of the integration process, while deploring that all the crucial values that marked that period have gone missing somewhere along the way, when Europe has become an end in itself instead of a means for higher human ends.

After the ideas of Weiler the more philosophical approach of Jürgen Habermas follows. Habermas from a pro-integrationist point of view has always seemed to try to save or rescue certain important values of democracy in the era of globalisation, which makes necessary to develop democracy at supranational European level. According to Nergelius Habermas is a very (sometimes excessively) idealistic thinker believing the great historical aims of European process and that the element of social policy must be added to the EU policy agenda. His ideal EU constitution includes a second chamber of government representatives with a stronger position than in national federal constitutions. Nergelius thinks that Habermas over-emphasises the need for solidarity between EU citizens and their need to feel united by common political plans. Habermas is truly idealistic, but unfortunately urging for rapid constitutional change also in areas where it seems possible to let the integration develop in its own space.

Fritz Scharpf's clear political and ideological approach is the topic of the third subsection. At the very heart of his view on current problems of European integration lays the difference between the so-called negative and positive integration, and the fact that it has apparently been easier for the EU to achieve the former. Policies of positive integration, which would re-construct a capacity for market-correcting regulations at the European level, depend on near-unanimity, and thus easily blocked by conflict of interests among national governments. This makes the EU lose its legitimacy. Nergelius reproaches that Scharpf's analysis of problems in the integration process and criticism of some of its alleged failures is strongly coloured by an ideological bias, in favour of national welfare-state model that seems to have reached its peak in the late 1960's. From a constitutional point of view, it is remarkably vague and unsharp.

Finally the almost majestic, both historical, political and constitutional criticism launched by Giandomenico Majone is covered. One of the main points in his criticism of the EU integration is that the integration process within the EU has gone further than can be accepted from the point of view of democratic legitimacy. According to him the integration process so far is an

“integration by stealth”. What he reacts against is the tendency of the EU, ever since the beginning of the integration process, of the founders to use the negative integration as a tool to promote the building of supranational institutions, and in the end also to promote political integration. Ideologically Majone is more of a market oriented neo-liberal than a left wing defender of a welfare-state. The democratic deficit of the EU is not a problem as such, since the EU is not a federal state and a part of this criticism has to do with problems that are common to all modern democracies. He is one of the most ardent and outspoken critics of the Community Method.

Nergelius criticises first the inconsistencies in the thinking of Majone, however, the real problem in his view occur when Majone tries to analyse what all those problems will mean for the future development of democracy. In Nergelius view the comparison between the EU and the USA of 1787, or EU and national decision-making is not adequate. Majone’s final proposal on increasing the involvement of national parliaments in European affairs also seems quite modest.

Comparing these four thinkers, all of them agree that the absence of European *demos* is a true problem for the Union. Scharpf sees the difficulties for the EU to deliver any kind of positive or political integration as a main obstacle, Majone thinks that this issue is not part of the problem at all. Habermas believes that the days of the nation-state as a main political entity are gone, while Majone want to re-vitalise it. Weiler and Majone both think that the EU (EC) definitely took a wrong turn with the Single European Act.

Nergelius, considering that the presented doctrines could be described as ghost hunting, tries to turn to the question of how the EU needs to develop. Thus in the concluding chapter he provides more comments on some weak points of these important thinkers and explores his own views on the future ways to follow for European integration as such.

As for describing the current situation, in his opinion the EU is a federation but not a federal state or maybe a political community though not a nation state. The EU is a unique entity, which must not be equated in any way to correspond to a nation state; a fact which, according to Nergelius does not make it less democratic *per se*. He contends that institutional changes, that might make the EU stronger or more democratic, will weaken the national democracies or the Member States. The division of power, competencies and even democracy between the EU and the Member States is not a zero sum game. He thinks that the Lisbon Treaty may mark a step forward in the constitutional thinking of the Member States, through the increased involvement of national parliament to the different decision-making procedures. The chosen institutional structure as a whole seems anyway somewhat more blurred. The Lisbon Treaty to a certain extent means a departure from the Community Method.

Nergelius welcomes the ideas of MacCormick according to which the requirements of culture or common ethnicity or language as constitutive of a *demos* should not be overstressed. Instead a common, European political community is needed which is based on common values rather than on language or ethnic background. An ideal kind of European Community, for Nergelius is based

not only on national identities, but also on the actual existence of a European public sphere, which in reality affects all European citizens in their daily lives.

He assumes that there is a room also for a more radical idea consisting of organizing one single European referendum, held at the same time in all 27 Member States. It cannot be legally binding, but should instead be seen as a kind of giant opinion poll. He thinks that simultaneous campaigns would prevent that national issues influence the outcome of the result in individual states. We may, however, ask whether the participation at such referendum would be high enough to consider it a “giant” opinion poll. At the European parliamentary elections, though campaigns are in many countries about national issues, the participation is less and less. What would be the result in case of campaign solely on “European” matters (if it is always possible to limit the boundary between national and European issues).

Nergelius also underlines that supranationalism as a value in itself becomes extremely important in the 21st century, in a globalised world facing global economic crises, climate change or terrorism. Supranationalism may give Europe a comparative advantage, in political and economical terms, in relation to other parts of the world.

We may conclude that this book is neither a comment on the Lisbon Treaty, nor a work entirely directed to academics. It may be seen as a contribution on which ideals ought to guide future European integration. It intends to influence the more concrete constitutional discussion in Europe. The theoretical standpoints seem well-balanced between idealism and pragmatism. If we may offer a remark on one point we could formulate that though Nergelius urges for practical answers for actual problems for the European integration, his idea of the pan-European referendum on European constitution which he presents in a very detailed way may appear weak to solve the so-called constitutional dilemma of the EU and can be strongly questioned.