Book review

Siegfried Magiera/Karl-Peter Sommermann (eds.), Verwaltung und Governance im Mehrebenensystem der Europäischen Union, Duncker & Humblot, Schriften zum Europäischen Recht, Bd. 85, Berlin 2002, ISBN 3-428-10666-0, 197 pp., 46 €

By Stephan Bitter[*]

In March 2001, the second Speyerer Europa-Forum took place at the German University of Administrative Sciences, Speyer. High ranking members of the European administration as well as their counterparts from the German federal (Bund) and state (Länder) level met with scholars in order to discuss the implications of recent developments in European integration on the different administrative levels. The book comprises most of the presentations given at the forum. Although the scope of the symposium in Speyer seems to have been confined to a relatively narrow topic - administration and governance in the multilevel system of the European Union -, all the papers as well as the following discussions, which are also documented, make abundantly clear that a valuable debate on those issues is closely connected with the seminal question of the finality of the European Union, i.e. the question to which end the EU is further integrating. The discussion of this topic has gained new impetus after the German Foreign Minister, Joschka Fischer, had given his now famous Humboldt-speech in May 2000.[1] This speech led to an enormous amount of responses both from the political and the academic community.[2] After the Treaty

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[1] Joschka Fischer, Vom Staatenverbund zur Föderation. Gedanken über die Finalität der europäischen Union, FCE Spezial 2/00, found at http://www.whi-berlin.de/fischer.htm; an English version of the speech ("From confederacy to federation – Thoughts on the finality of European integration") can be downloaded from http://www.auswaertiges-amt.de/www/de/infoservice/download/pdf/reden/redene/r000512b-r1008e.pdf.

[2] Cf. e.g. the letter of the French Foreign Minister M. Hubert Védrine to Fischer, found at http://www.doc.diplomatie.gouv.fr/BASIS/epic/www/doc/DDW?M=42&K=948060173&W=AUTEUR+PH+IS+%27Vedrine%27+AND+TEXTE+PH+IS+%27federation%27+ORDER+BY+DATE/Descend; or the contributions in Christian Joerges/Yves Mény/Joseph H.H. Weiler (eds.), What kind of constitution

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of Nice had been concluded and generally perceived as unsatisfactory, the debate on the finality of European integration promised the answers to the increasingly pressing questions of the imminent enlargement of the Union. The contributions in this volume make clear that many writers see the finality question as the fundamental problem to be addressed necessarily when assessing any question arising out of the European integration.

Accordingly, the first three articles concentrate on diverse aspects of the finality of the EU. Starting from the aforementioned premise, Tsatsos examines whether the Treaty of Nice is guided by a concept of finality.[3] He concludes that the governments have not reached a satisfactory solution to this problem. Instead, they have agreed on a treaty which furthers administrative efficiency rather than democratic accountability. Tsatsos thus concludes that the Nice Treaty does not contain a vision of the future Union.

Capitant examines the French approach to the finality of the European Union, understood as the premise of any further constitutional development of the EU de lege ferenda.[4] Capitant compares the French with the German approach to European integration and considers it difficult to define exactly which of the two states is "more federal" than the other since a possible federal vision within a Member State will always be superseded by the current political exigencies. Although France historically developed as a centralistic state it is, according to Capitant, open for further European integration even in a more federal way, while differences to the German approach still remain, especially with respect to the institutional structure of the EU.

Monar discusses the question if the constitutional process within the EU after the Treaty of Nice should be seen as a mere means to achieve certain political goals of integration, or if a European constitution should be perceived as the telos of European integration.[5] In order to avoid a dysfunctional constitutional patchwork, only the conception of a constitution as the telos of integration on its own is sensible to Monar. However, such a concept would necessitate an honest discussion on the

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for what kind of polity? – Responses to Joschka Fischer, 2000, these texts may also be found at http://www.jeanmonnetprogram.org/papers/00/symp.html.

[3] Dimitris Th. Tsatsos, Nizza-Vertrag: Der fehlende Zusammenhang zwischen Finalität und institutioneller Entwicklung der EU, in: Magiera/Sommermann (eds.), pp. 15 – 20.

[4] David Capitant, Die Finalität der Europäischen Union aus französischer Sicht, in: Magiera/Sommermann (eds.), pp. 21 – 28.

[5] Jörg Monar, Anmerkungen zur Verfassungsdebatte nach Nizza: Verfassung als Zweck oder Mittel, Verfassungsfähigkeit und Verfassungsentstehung, in: Magiera/Sommermann (eds.), pp. 29 – 44.

finality of the EU for which, in his view, the European governments are not prepared. Monar does not accept the argument that the EU is not capable of having a constitution because of the absence of a European people (so-called "no demos"-thesis). Nevertheless, he contends that there are other, less frequently discussed, obstacles for a European constitution such as a lacking constitutional consensus within Europe, insufficient solidarity between the Member States and between their respective citizens, as well as the European enlargement. Monar does not accept that the process of constitutionalisation may create the European constitution as this view bears the danger of overemphasising the process-like character of the European constitution, thereby undermining a meaningful concept of constitution.
Bearing in mind that the Convention under the presidency of Valéry Giscard d'Estaing in the meantime has issued its Draft Treaty establishing a Constitution for Europe (DCT), Monar has delivered a thoughtful contribution on the fundamental issue of where Europe wants to go. However, his view that there is no constitutional consensus was probably already too pessimistic in 2001. In 2004 one can make an even stronger argument in favour of the existence of a constitutional consensus. The Preamble to and the Articles I-1 et seq. of the DCT, especially Article I-2 dealing with the values of the Union, show that there is a widespread consensus on what the Union stands for.[6] The discussion on the inclusion of an invocatio dei cannot conceal the fact that the values on which the Convention agreed are sufficient to base a polity on, if there actually is a need for such values.[7]

Less obviously connected with the finality debate is the discussion about European governance. However, the contribution of Schmitt von Sydow establishes the link between these two topics.[8] His notion of governance corresponds to the one given by the Commission as presented in its White Paper on Governance (which was not yet published at the time of the Speyerer Europa-Forum).[9] This includes transparency of administrative action and democratic accountability. According to Schmitt von Sydow, without these characteristics, the future challenges for the EU cannot be mastered. Thus, governance is at the very heart of the finality of the EU as it is

[6] This is not to say that the Draft Constitutional Treaty will by itself create a European identity. For a detailed analysis, see Armin von Bogdandy, Europäische Verfassung und europäische Identität, Juristenzeitung 2004, pp. 53 – 61.

[7] The 2004 Intergovernmental Conference has now agreed upon the DCT, see the document CIG 87/04 of 6 August 2004, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/81675.pdf.

[8] Helmut Schmitt von Sydow, Governance im europäischen Mehrebenensystem, in: Magiera/Sommermann (eds.), pp. 171 – 185.

[9] European Commission, European Governance. A White Paper, COM (2001), 428 final. The White Paper can be downloaded from http://www.europa.eu.int/cgi-bin/eur-lex/udl.pl?REQUEST=Seek-Deliver&COLLECTION=com&SERVICE=all&LANGUAGE=en&DOCID=501PC0428.

the sine qua non for any objective of the EU. Interestingly, Schmitt von Sydow stresses the necessity of an "open co-ordination" within a network of competences between the respective European and national authorities instead of a strict catalogue of competences defining the powers of the EU and the Member States. Although the concept of such an open co-ordination remains somewhat vague and could be said to be in contradiction to the axiom of transparency, his approach is in line with the multilevel structure of the EU which is dependent on the cooperation between the authorities which have to implement EU law.

Further contributions to the book concentrate on more technical issues of administration in the European multilevel system. Hölscheidt examines the legal regime governing the transposition of European directives into national law in Germany.[10] He is critical with regard to legislation by directives because, in his view, directives are primarily issued by the executives of the Member States assembled in the Council and not by a true legislator. Furthermore, the content and the goals of the directives become increasingly detailed thereby contravening Article 249 para. 3 EC.

However, his critique of legislation by way of directives would apply to every legislative act of the EU. Hölscheidt seems to underestimate the role of the European Parliament in the co-decision procedure (Article 251 EC) and the status of the Council and the Parliament acting in concert as the European legislator. Moreover, Hölscheidt's critique is based on a misconception of Article 249 para. 3 EC as only allowing for framework descriptions of the substantive goals of the directive. Yet, Article 249 para. 3 EC only states that a directive leaves the Member States the means to implement its contents, thereby providing for a unique mode of indirect legislation. The most important feature of legislation by directive remains untouched by this understanding of Article 249 para. 3 EC: the exclusion of direct effect at the expense of the individual. Apart from this critique, Hölscheidt's contribution is very instructive concerning the legal and technical problems in the implementation of European directives in Germany. His contribution thus obviously benefits from his own practical insights as a high ranking official at the German Bundestag.

Böhm analyses the question of how a liability for penalty payments according to Article 228 para. 2 EC or for fines according to Article 104 para. 11 EC following a violation of European law by the German states (the Länder) is regulated in Ger-

[10] Sven Hölscheidt, Verfahren der Umsetzung des Gemeinschaftsrechts in den Mitgliedstaaten, in: Magiera/Sommermann (eds.), pp. 55 – 73.

many, i.e. what entity is financially responsible for such violations.[11] Interestingly, she concludes that there is no provision in German law governing such a liability between the federal level and the Länder. De lege ferenda she proposes an amendment of Article 23 German Basic Law similar to the provision of Article 104a para. 5 German Basic Law which concerns the liability of the Länder for an orderly administration of federal expenses.

Koenig and Kühling assess the qualification of infrastructural aids as state aids within the meaning of Articles 87 et seq. EC and the involvement of private actors within public private partnerships.[12] In their thorough contribution they conclude that the Commission chooses a practical and sensible approach which may be criticised as not being very coherent, but carefully respecting national reservations.
Schnapauff's and Löper's presentations deal with the European cooperation in justice and home affairs.[13] Being high ranking officials in the Federal Ministry for Home Affairs, they are directly affected by developments in this area. With further communitarisation of the immigration and asylum policy, in their view, core areas of the national identity of each Member State are affected. Whereas Schnapauff examines the developments in primary EU law, Löper concentrates on the respective secondary law as introduced especially after the Amsterdam Treaty.

The introduction by Magiera and the epilogue by Sommermann convincingly provide the framework for the individual contributions. Meritoriously, the editors chose to print the respective discussions following the presentations in the book. This helps in clarifying certain aspects of the presentations given and makes for a worthwhile reading.

The book gives an interesting overview over important developments in the process of European integration. The more fundamental articles may contribute to the – still – relevant discussions on the finality of the EU and its constitution. The articles concerned with the more technical issues of integration offer helpful thoughts on certain areas of administration in the European multilevel system. The few points of critique cannot belittle the overall positive assessment of every single contribu-

[11] Monika Böhm, Haftung bei Verletzung des Gemeinschaftsrechts im Verhältnis von Bund und Ländern, in: Magiera/Sommermann (eds.), pp. 89 – 106.

[12] Christian Koenig/ Jürgen Kühling, EG-beihilfenrechtliche Beurteilung mitgliedstaatlicher Infrastrukturförderung im Zeichen zunehmender Privatisierung, in: Magiera/Sommermann (eds.), pp. 115 – 135.

[13] Klaus-Dieter Schnapauff, Europäische Zusammenarbeit in den Bereichen Justiz und Inneres – primärrechtliche Aspekte, in: Magiera/Sommermann (eds.), pp. 143 – 151; Friedrich Löper, Europäische Zusammenarbeit in den Bereichen Justiz und Inneres – sekundärrechtliche Aspekte, in: Magiera/Sommermann (eds.), pp. 153 – 162.

tion as being very instructive. Due to the fact that the majority of the discussion was held by practitioners, the presentations for the most part restrict themselves to the more practical effects of European integration on administration. Thus, it can be concluded that the book is foremost directed to the interested members of the public service, be it at the European, the national or the regional level. However, interested scholars and students will also benefit from reading this book since it provides for rare and remarkable insights from a more practical point of view.

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