

## ***Book Review - Anne Peters: Elemente einer Theorie der Verfassung Europas (2001)***

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**Anne Peters: Elemente einer Theorie der Verfassung Europas (Veröffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel 137) Berlin (Duncker & Humblot) 2001, 889 pp. € 84,--**

The Importance of Being Earnest. This characterises the German national character in a nutshell. But unlike Oscar Wilde, the Germans are not joking around. They mean what they say. In this respect, this is a very German book. It takes almost 900 pages to say that the European Union has a constitution, and that it needs one. What the heck is that good for, Anglo-Saxon pragmatists might wonder. And they would be partly right, were it not for one eventuality. The book could have been significantly shorter were there not a heated debate among German lawyers about this topic. As it is, the book takes great pains to convince these lawyers that much of this debate is just shadow boxing. Put differently, when these lawyers are unwilling to interpret part of European law as a constitution, they have different normative problems in mind. They unduly equate the state and the constitution (93). They have problems in finding a European people (105), a European territory (105), or unconditioned sovereignty (113). Since non-Germans do not tend to have these problems, this part of the book shall be skipped here.

Most of the book, however, is clearly also relevant for non-Germans. The book asks two big questions. Both can be easily put in terminology from political science: What does the idea of a constitution mean in a system of multi-level governance? And what does it mean for a polity in the making? Both are significant for the European Union. It is not a federal state (179). Rather, it pierces the sovereign veil of its member states, without being a state itself. And the European Union did not start with a full fledged constitution. Rather, it has exhibited progressive constitutionalisation (372).

Much of the legal discussion can be seen as based on a misunderstanding. Lawyers, especially German lawyers, have tended to collapse these two questions. Integrationists have seen multi-level governance only as an intermediate step on the way towards the formation of a true European state. It thus is no more than an episode

of the polity in the making. Governmentalists think the same way, but feel differently. In the interest of preserving the full statehood of the member states, they see multi-level governance as a slippery slope towards a European state. Anne Peters rightly keeps the two questions separate (167, 360).

A system of multi-level governance needs a functional, not an ontological concept of the constitution (38). The constitution must match a political and legal reality in which neither level is fully autonomous (103). There is a need for unbundling constitutional functions (163). Together, both levels must found a “constitutional compound” (*Verfassungsverbund*) (205). National constitutions must open themselves up to the impact of Europe (210). And the European constitution must be aware of the merely conditional autonomy of the European legal order. Put differently, both constitutional levels must become mutually dependent. A legal way of achieving this would be to employ the idea of a constitutional conflict of laws (cf. 333).

Anne Peters is hesitant about going the whole distance with this idea though. She already dislikes the idea of Europe being a system of multi-level governance (189). But her criticism seems to be misplaced. Political scientists are far from a simplistic interpretation of the concept. To avoid misunderstandings, some even speak of governance across multiple arenas. Moreover, Anne Peters does not always control her integrationist feelings. Not to be misunderstood: Every academic may have whatever normative feelings he would like. But the major breakthrough of her book is in distinguishing constitutionalisation from the fleshing out of what a constitution means for a system of multi-level governance. In such a system, it is hard to make the community constitution responsive to member states influence by the backdoor only. But this is all Anne Peters allows for. She calls for an interpretation of a truly autonomous European constitution in light of the member states’ legitimate expectations (291). In line with this, she explicitly speaks up against the constitutional conflicts of laws (335).

This reads like a truism: A polity in the making needs a constitution in the making. Yet constitutional theorists have a hard time living up to that statement. They are acquainted with constitutions being written down in a solemn form on one given day. But constitutionalisation can be a process (372). If so, creating the constitution and changing it become a continuum (379). Europe has repeatedly had recourse to high open politics for constitution-making (433). But constitutional evolution has not been confined to this. There is constitutional activity by organs like the Council (397) and the European Court of Justice in particular (401), and there is informal constitution-making (461), which can be elegantly cast into the English concept of constitutional conventions (469). It is a sort of constitutional softlaw (467). For a polity in the making, the major dogmatic challenge is in distinguishing action within the constitution from implicit constitutional amendments (cf. 408, 478).

It is easy to reconstruct the message of the book as thus outlined. In that reading, the book speaks to a problem of constitutional theory. It states the types of questions the theorist ought to ask. This would not exclude dogmatic work. But in an intellectually pure approach, a two-level structure would impose itself. At the first level, the constitutional theory for a system of multi-level governance, and for a polity in the making would be developed. At the second level, there would be an attempt to map these theoretical concepts to European legal reality. In all likelihood, the theoretical concepts would fit largely, but not entirely.

Anne Peters tries to do both at a time. This sometimes makes it difficult for the reader to assess the status of her argument. One example may illustrate the point. She starts the section on multi-level governance with the assertion that defining what the constitution means in the European context has direct legal effects (167). In the terminology of Herbert Hart, she thus adopts an internal view of law. Sociologically speaking, she assumes the role of the legal actor. In the next sentence, however, she speaks up against a mere definitional approach (*Begriffsjurisprudenz*). She claims to be in the business of legal evolution (167). Two pages later she writes: "The constitutional legislator can pick the academic input up" (169). In that case, science is no longer a legal, but a political actor. In yet other places, Anne Peters sees her work as generating political heuristics (175) and regulative ideas (207). Generally speaking, the book does not always seem to be aware of the distinction between descriptive and prescriptive work, and of the related distinction between an observer and an actor.

A polity in the making faces a particularly acute problem of legitimacy (499, 615). Usually, it can only be determined ex post whether the constitution has been amended. The jurisdiction and the procedure for amending the constitution are diffuse. Why is this not merely an act of usurpation? Why are those who did not actively participate in the process obliged to recognise the outcome as a change in the constitution? Anne Peters tries to cut the Gordian knot by inventing a new theory of legitimation. She calls it a legitimation ex post (517) or legitimation by success (580).

Whether this is of help depends on how one defines legitimacy. Anne Peters is not fully clear on this. "Legitimacy means being justified or being worthy of acceptance" (499). She looks for an "ethically founded, extra legal concept of legitimacy" (515). But what is the purpose of this theory? Guiding "rational constitutional design" (609) can certainly not be the whole story.

Generating actual acceptance could be a task. Anne Peters is seemingly inclined to this: For she criticizes traditional theories of legitimacy since they often can only be understood by experts (587). She also points to the legitimacy generated by visibly positive experience (598). And she says that re-election generates legitimacy for earlier policies (582). But she criticizes a post-modern, narrative approach to legitimacy (513). More generally, according to her the mere probability of implementation is not enough. In order to be legitimate, governmental activity must meet external normative benchmarks (508).

Moreover, traditional theories of legitimacy have especially been generated for instances where no experience has been acquired. Such theories allow government to intervene nonetheless. Peters sees the problem, but does not have much to offer. She allows for indirect experiences generated in other jurisdictions, or in other areas of law. If none of this is available, legitimate law-making must stick to traditions (580). The performance of her theory is thus poor where it is needed most.

Moreover, the theory lacks a conceptual basis. Of course, the book offers one. It is the critical rationalism of Popper and Albert (578, 595). But Peters violates the basic tenet of this theory. She allows positive testing (598). For critical rationalists, all knowledge is fallible. Positive testing is useless. Only falsification is a viable strategy for research. More importantly even, critical rationalism has been made for an entirely different purpose. It is an exercise in the philosophy of science. Sciences make progress, if earlier hypotheses become falsified. Generating legitimacy for a constitution has nothing to do with the testing of hypotheses. A third problem is the flawed benchmark for testing. A constitutional norm is legitimate, "if it actually improves the well-being of individuals" (516). Normative individualism thus enters by the back door (explicitly 547, 569, 624). This is inconsistent with the claim that this theory avoids any "ex ante definition of the common good" (523). Moreover, if normative individualism is the benchmark, there is no longer any need for testing. Legitimacy can simply be deducted from one of the available individualistic theories.

What Anne Peters is really after is an evolutionary theory of legitimacy. She underscores the uncertainty inherent in any law-making (586). But she also claims that "important ethical principles are not disputed in Europe" (516). She further claims that experience allows the conscious and rational evolution of rules, if this is done on a provisional basis and following a piecemeal approach (609). She explicitly denies the idea of fundamental normative relativity (514). The ultimate instance for evaluating a constitution is the citizens (580). They can be helped by implementation research done by social scientists (582).

Historical contingency is thus key to understanding the approach. It makes it possible to ignore the constructivist problem. It also makes it possible to avoid rigorous theoretical reasoning. Will this really work? Anne Peters seems doubtful herself. "Presently in Europe such axioms are plausible only in very general form. The European constitution would be illegitimate, if it did not proclaim the adherence of Europe to the idea of human rights. But at this very abstract level, the European constitution doesn't have problems of legitimation anyhow" (517). Conceptually, such an approach presupposes a high degree of cultural coherence. This seems particularly unlikely in a polity in the making.

But the problem that brought Anne Peters into all this is real. It indeed is not easy to generate legitimacy for a polity in the making. The theory by Anne Peters is not able to solve the problem. But it might help diminish it. To the extent that the European public opinion actually accepts an element of progressive constitutionalisation, the need for legitimacy diminishes. In terms of constitutional politics, it can be more important to pro-actively foster the generation of such a public opinion than to engage in complex legitimacy analysis. But *vis-à-vis* those who are in opposition, it will still be necessary to have recourse to traditional theories of legitimacy.

Even such a rather lengthy book review must be selective. For reasons of space, the last section, on democracy theory, has not even been touched upon. But the review should have demonstrated that the author's motto is convincing: There is nothing as practical as a good theory.