The Constitutional Turn Was Fraught With Risks

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DAMIAN CHALMERS, CHRISTOS HADJIEMMANUIL, GIORGIO MONTI & ADAM TOMKINS, *European Union Law* (Cambridge, Cambridge University Press 2006) 1235 p., ISBN 0521527414

This new and eloquent publication opens with some thorny dilemmas. Does European Union law embody new ideals, new rights and new forms of welfare, or is it intrusive, divisive and costly? Does it bring an international comity? Is it a powerful countervailing force against parochialism or is it intolerant of national diversity and bad for democracy? The authors of this book provide a clear synopsis and a penetrating analysis of European Union law and an edifying overview of its social, political and economic context and consequences. As the book addresses these wider background issues, it would be a stimulating and thought-provoking addition to the reading list of any law student. The authors also discuss the crisis triggered by the Constitutional Treaty and – in the light of the apparent 'failure' thereof – reflect at length on the quest for a more democratic Europe and its need for legitimacy. How can power best be divided between the European Union and the member states?

Chalmers, Hadjiemmanuil, Monti and Tomkins attempt to answer all these questions by exploring a large, multi-sourced body of literature, relating to case-law from the Court of Justice, the European Court of Human Rights, and national courts, including some interesting examples from the USA. Some important lessons can be learned from their research. The authors guide the reader through the many pathways of European Union law, starting with the idea of Europe and quoting Habermas and Derrida. For some, a 'return to Europe' means an orientation towards the West and the values associated with the USA, more specifically, free markets and constitutional democracy. The authors however claim that Europe has acquired an alternative meaning in modern-day Western Europe, with values that are partly similar to, but also partly different from those in the USA. What binds Europeans together is the shaping legacy of the totalitarian regimes of the twentieth century and the Holocaust. In Europe, there is a strong emphasis on the social market and 'European' values – such as the abolition of capital punishment – which do not figure in the USA (p. 5).

The notion of Europe as a competing alternative to the nation state, replicating the symbols and tools of nationhood at a pan-European level (flag, anthem, common passports), creates tensions. The passage in the Preamble to the draft proposal for the Maastricht Treaty, which stated that the Treaty marks a new stage in the progression towards a Union with a federal goal, was removed at the insistence of the British government because it implied a gradual accretion of macro-economic, defense and foreign policy powers under a single, central European Union authority. The British vision was that the allocation of legislative power was to remain a matter of national choice. To ease the tensions on competence issues, *Maastricht* witnessed the start of opt-outs for individual member states. The subsidiarity principle, which was introduced for the same reason, however implied that there was still a pan-Union answer to questions about the allocation of legislative responsibility.

When the Danes voted against ratification of the Treaty on European Union in 1992, the process was shaken to the core. Although the other member states considered the Treaty non-negotiable, something had to be done so that the Danish government could say that the Treaty it was putting forward for a second referendum was substantially different from the one it had put forward for the first. The result was a Decision 'interpreting' the Treaty, which gave the Danish government enough spurt to hold a second referendum and to appease the Danish electorate.[1] However, although 56% voted in favor, according the authors the damage had been done (p. 30): 'The political aura of inevitable integration and the assumption of popular support for it had been tarnished.'

After the Danish referendum, a bitter legislative fight took place in the British Parliament. The ratification drama was re-enacted in the national courts. The most far-reaching decision was generated by the challenge of Brunner c.s. of the Treaty on European Union before the German Constitutional Court. The *Bundesverfassungsgericht* ruled that democratic legitimacy is constituted at national level and resides firmly in 'regional and national parliaments' (p. 31). The European Union derives its legitimacy from member states' decisions to grant it powers that they are no longer able to exercise effectively. The European Union is a 'federation of states', not a 'superstate'. The Constitutional Court recognized that the independence of the European Central Bank restricted the operational scope of the democratic principle. However, as the German *Bundesbank* was run on similar institutional lines and politicians cannot be trusted when it comes to money, this was considered a justifiable and admissible exception, which already formed part of the German constitutional order (p. 520):

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[1] *See also* Helle Krunke, 'Peoples' Vengeances. From Maastricht to Edinburgh: The Danish Solution', *EuConst* (2005) p. 339 et seq.

> In Germany, the Federal Constitutional Court upheld the constitutionality of the Maastricht Treaty, opening the road for Germany's participation in EMU, while reaffirming in principle the residual sovereignty of the German state and the constitutional obligation of its organs to refuse to apply legal acts of the European institutions and organs that transgress the limits of sovereign powers transferred to them under the Treaty.

The German Constitutional Court ruled that the Treaty did not breach the German Constitution, but it did place 'clear constraints' on the further development of European integration (p. 201):

> Some commentators have argued that (…) *Brunner* is a bald restatement of national constitutional sovereignty and that, as such, it stands in direct opposition to *Costa*. It is not clear, however, that this is what was actually asserted in *Brunner*. After all, the judgement states that limited sovereign powers have been transferred to the European Union. This is a statement that EU law has some kind of sovereign authority, albeit not of an absolute sort. It is to enjoy day-to-day authority, which will be lost only if it transgresses certain predetermined limits (…).

In 1996, opinion polls revealed that only 48% regarded the European Union as a 'good thing', compared with 72% in 1990. Hence, the authors are sceptical of the claim in the Laeken Declaration on the Future of the European Union (2001) that the European Union is a success story. Just how successful has the European Union been from a constitutional point of view? Certainly, the European Union has helped to secure peace. However, to what extent has its political ambitions been realized? Is it not the case that the economic successes have been enjoyed despite the political and constitutional structures and values of the European Union rather than because of them? Intellectual, popular, political and legal challenges to the authority of the European Union seem to have gone largely unanswered. The initial rejection of the Treaty of Nice in Ireland suggests at least a degree of popular resistance to an 'ever closer union'. The resignation of the Santer Commission in 1999 was 'a shocking moment that revealed the depths of mismanagement and maladministration to which the Commission had sunk' (p. 61).

European integration as a political project was influenced by the concept of modern citizenship. The introduction of European Union citizenship is one of the reasons why politicians have regarded the Maastricht decision of the German Constitutional Court as outdated. But the authors are critical of European citizenship. As citizenship has traditionally been the preserve of nation states, the creation of European citizenship raises the question of what sort of political community can be established beyond the nation state. The authors answer this question with the help of historians and sociologists. European citizenship is a composite

citizenship. To be a European citizen, one must first be a national of a member
state. But, the Court of Justice of the European Communities in *Uecker* (C-64/96
and C-65/96) stated that citizenship of the Union does not mean that the scope
ratione materiae of the Treaty should extend to internal situations, which have no
link with Community Law. However, according to the authors, almost all of the
rights conferred by European citizenship are contingent upon residence in a member
state other than that of one's own nationality, although there is not an unlimited
right to residence in that state (p. 568). The problem is that nested social citizen-
ship is not guided by any coherent political authority. The greatest weakness in
European citizenship stems from the impossibility of pointing to an overall ideol-
ogy, which defines the social rights that should be granted to European citizens (p.
602):

> In return for the grant of citizen's rights to non-nationals, it has sacrificed any
> kind of overall schema or programme that could act as a totem or symbol inform-
> ing the Union's citizens how the Union enfranchises them and why it does so.

One could defend the Constitutional Treaty as an exercise in polity-building, an
invitation to European citizens to reconsider their values and their sense of politi-
cal community, and to recast them in European terms. Nevertheless, for Chalmers,
Hadjiemmanuil, Monti and Tomkins, it is an exercise fraught with risks. The
desirability of enlargement, the sovereignty of Union law, the benefits of the single
market – notions hitherto taken somewhat for granted – were now in the spot-
light. The reaction to the Danish 'no' to *Maastricht* and the Irish 'no' to *Nice* was
that the voters had misunderstood the question or got the answer wrong and
should be asked to rethink their views. But the reaction to the French and Dutch
'no' was different: now there was recognition that citizens had expressed concerns
and worries which need to be addressed. It was necessary to pause to allow for
reflection on what to do next. According the authors, this is a 'practical question'
with several options. The choice of the route 'begs a bigger question about what
the European Union is about and what the meaning and purpose of the constitu-
tional turn was' (p. 82).

   What exactly was the constitutional turn that the Constitutional Treaty was
designed to accomplish? That is actually not very clear. One of the reasons for the
'failure' of the Constitutional Treaty may lie in the Convention's inability to de-
cide whether to reconstitute the present European Union or to constitute a new
European Union. The result was a Treaty that claimed to be a Constitution, but at
the same time a Constitution that took the legal form of a Treaty: it could not be
ratified and amended by a majority of states or by a majority vote in a single
Europe-wide referendum. In that sense, the European Union's search for 'legiti-
macy-through-constitution' was to no avail. If the attempt to seek greater (or

clearer) legitimacy for the European Union through constitutionalism should be abandoned – 'laudable as it may have been' – it remains to be seen whether it will mean that European nation-states find it more difficult to hold on to their values of social welfare in a global economy (p. 85).

The authors are more positive about the strategy deployed by the European Community for creating the current framework for liberalizing markets whilst preserving services of general interest, 'enhancing the legitimacy of Community action by bringing Europe closer to its citizens through the creation of a Community-wide conception of the general interest' (p. 1152).

The critical approach combined with the sharp analysis of European Union law and the topical explanation of the wider contextual issues make this book essential reading for undergraduates and experienced researchers alike.