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Nordic and Other European Constitutional Traditions

Edited by Joakim Nergelius

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NORDIC AND OTHER EUROPEAN CONSTITUTIONAL TRADITIONS

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Preface

For a long period of time the Nordic countries saw themselves or were viewed upon as something different from Europe. The Nordic institutions and the long tradition of Nordic co-operation in different forms could also be seen as a hallmark of the joint actions of "non-European Nordic countries". In a historic perspective, the states have experienced war between and domination of each other. However, since almost 200 years the Nordic countries have been a peaceful area in that respect, in spite of great political-institutional changes. There is a shared cultural heritage and also some political-institutional similarities.

Today the Nordic heritage is rather a regional aspect of European integration in a broader sense. It is not possible to accuse the Nordic states of representing insularity. But the political memories are still lingering in the constitutional traditions and give an important contribution to the institutional complexity of the EU.

A European conference about Nordic and other European Constitutional traditions was organized by professor Joakim Nergelius at the Department of law at Örebro university in March 2004. This young Swedish university has the vision of establishing a truly European research university. The theme of the conference was therefore of great interest and significance for the university. But during the lively discussions it became obvious that the different contributions by the participants also could be of a more general interest. I am very pleased that it proved possible to produce this anthology, which is also an encouraging expression of the professional involvement of different scholars across Europe in this important issue.

Vice-chancellor Janerik Gidlund
University of Örebro

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Section 1

Chapter I

The Nordic States and Continental Europe: A Two-fold Story

Joakim Nergelius*

The topic discussed in and giving its name to this collection of articles seems to be very timely, for many reasons. The Nordic countries do in many ways today find themselves at a constitutional crossroads, no longer able to live on memories of a glorious past when they were perhaps the leading welfare states in the world. Not least the three Nordic EU Member States Denmark, Finland and Sweden have in the last decades been profoundly affected by the encounter with other, continental constitutional cultures prevailing within the European Union and thus with legal orders less based on popular sovereignty and parliamentary supremacy and more relying on courts to fill the role as constitutional watchdogs. Also Norway and Iceland, though remaining outside the EU for the time being, are affected by this development, though yet to a lesser degree. The Nordic constitutional tradition, if we may talk of such a thing, is undoubtedly based on local and national democracy, national and popular sovereignty, parliamentary supremacy and majority rule. The huge

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impact that this encounter or clash between very different constitutional traditions has had on the constitutional understanding, and in the long run on the legal and political thinking in the Nordic countries, has so far not been fully analysed in the constitutional doctrine.

The Nordic countries were once seen as forerunners on the way to a progessive, fair and civilised society, but when they lost that status as "welfare icons", they seem – albeit to various degrees – to be hit by a severe identity crisis. At the same time, also the political and constitutional systems of many older EU Member States are undergoing important changes or facing severe challenges at the moment. This is of course true of France and Netherlands, where recent referendas on the Draft EU constitution led to negative results, which have in fact also led to questions about the legitimacy of the EU constitutional system as such. But also countries like Italy, plagued by domestic turmoil, or Germany, shaken by pessimism and lack of clear political guidance for the future, have faced severe difficulties in their constitutional relationships with an EU legal order claiming supremacy over the national laws of the Member States. Among the new Member States, some of the enthusiasm that the prospect of EU membership brought about in the 1990's seems to have withered away.

It is exactly in this climate of tension, legal and political, bothering Europe that the Draft EU Constitution has been proposed. Having this in mind, the problems of making it enter into force are perhaps not entirely surprising.

Against this background of problems in many parts of Europe, this volume seems apt to address some of the reasons for the current *malaise*, as well as hopefully finding some way out of it. Hopefully, it may also give some new perspectives on issues that are as such quite often discussed in the European constitutional doctrine. The contributions here do in fact cover quite a huge area of the current crisis situation, ranging from analyses of individual countries inside and outside EU (Italy and Iceland), to theoretical and philosophical aspects of the Draft Constitution and purely historical perspectives on the European legal development. This range of topics could be seen as extremely far-reaching, but is hopefully thought-provoking enough concerning those very important issues.

If we may analyse the different contributions somewhat closer, Ola Zetterquist analyses the Draft Constitutional Treaty from a philosophical point of view, discussing whether it corresponds to the very classical, traditional concepts of either popular sovereignty or constitutionalism, as those models were once elaborated by Thomas Hobbes and John Locke. If any perspective has been truly missing in the hitherto after all rather vivid international debate on the EU constitution, this must be the one!

Still in the first section, Agust Thor Arnàson provides a full historical perspective of the traditionally rather cautious attitude towards closer relationship

with EU and possible EU membership shown by Iceland, a country on the fringe of Europe (which strictly geographically is in fact partly American). The history of this country and the reasons for its so far somewhat restrictive attitude towards the rest of Europe (which are not only due to geographical distance) are probably not very well-known to the European legal and political environment, but do undoubtedly merit increased attention.

Moving then to a section of the book with articles that are firmly rooted in continental Europe and its constitutional traditions, Rainer Arnold analyses the idea of closer cooperation in some depth. This idea used to attract a lot of interest from EU scholars and also politicians until very recently, but its future fate may have something to do with what will happen with the EU constitution; should it fail, the possibility for certain states to move ahead on their own with further integration may seem very attractive, but at the same time it is at the moment hard to imagine ancient core states like France, Germany and Netherlands as forerunners in any future integration process. Joachim Heilmann adds a few remarks on the current use and need of legal history, before Carlo Rossetti analyses some of the hotly contested issues of law and legitimacy in Italy from a perspective that has so far unfortunately been rare in the constitutional doctrine, focusing on the myriad of corruption allegations and the constitutional impact they may have both in Italy and at the EU level. Those issues are controversial and might for a foreign observer even seem to reflect a disturbingly deep distrust of political authorities, but it is a regrettable fact that they are very seldomly discussed seriously outside Italy (and very rarely in general EU discussions).

After that, Pasquale Policastro analyses some of the contents of the Constitution, as well as the effects of EU enlargement, in a historical perspective that is stretched back to the early 20th century. Support for some of the interpretations of the proposed new rules made by him may be found not least in the jurisprudence of the European Court of Justice and the European Court of Human Rights in the last thirty years and the increasingly individual-based view on basic human rights that they reflect.

In the last section, the ever-important issue of subsidiarity is discussed by Takis Tridimas, who also focuses on general tendencies in the recent case-law of the European Court of Justice and which kind of changes for the integration process that the Constitution, with its emphasis on certain values may bring about, should it finally enter into force. Finally, the problem of the difference between the EU constitutional debate, when held at the European level, and the same debate being conducted at the national level is analysed and highlighted, in the light of general developments in the European political debate, constitutional doctrine and jurisprudential tendencies. This is definitely one of the main hidden problems of those recent developments and one of the lessons to be learned from what happened in core Member States

like France and Netherlands in the spring of 2005, but the question is of course what may really be done about it.

Reflecting once again on the content of these articles, it may be asked if the Nordic states and the rest of Europe may after all still have a lot to learn from each other. The distrust of political and public authorities that are discussed or reflected in some of the above-mentioned contributions is traditionally not a feature of the normally quite transparent Nordic countries (though it may be growing there as well, as shown for instance by the ill-fated Swedish EMU referendum in 2003). At the same time, the undisputable results of the integration process have been reached by states who have co-operated in a joint project and who have been willing to take some risks in order to achieve those results. Also the reinforcement of human rights in Europe in the last fifty years must be viewed in this light. The Nordic countries in general are hesitant towards further European integration and do sometimes seem to be characterised by political "risk-aversion" more than anything else. This is true not least for Sweden. But is that a viable option in a globalised world, characterised not only by progress but also by dangers and many catastrophies, where states and regions tend to need and depend upon each other more than ever?

This is in fact one of the general questions that future studies in this area should need to dwell upon. If the Nordic countries have anything to offer in this process – and I definitely believe that they do – what they bring with them must be based on their own experiences, while they must at the same time be open for impressions from other European traditions. In the words of one young Finnish scholar:

> "The Nordic way of thinking may be of help but it does not provide concrete ideas suitable for transplantation for use in building the United States of Europe. Further, perhaps all it can do is to show that ideas originating from popular sovereignty and cautious form of constitutionalism do not form an impossible equation."[1]

And, having asked that question, we should also ask what the contribution of the legal and constitutional doctrine to this big future debate could be. Is it perhaps time for this doctrine to look at big, specific institutional issues, crucial for European and global governance, instead of more theoretical or obscure issues in specific countries? To be forward-oriented rather than backwards-looking in the intellectual and scientific approach? Multi-level oriented rather than "homeward bound"? And maybe even time to come up with new, specific and constructive proposals for solving the institutional crisis at

[1] Jaakko Husa, Nordic Reflections on Constitutional Law – A Comparative Nordic Perspective, Frankfurt a.M. 2002 p. 187.

EU – and why not global – level, instead of merely analysing by now rather well-known historical events in a manner more or less characterised by well-known attempts of "constitutional de-constructivism"? To tackle issues like this may in fact prove to be the next fruitful step in the development of the EU constitutional law doctrine, though this is of course a huge topic that merits a lot of further analysis.[2]

Though it may seem pretentious, this collection of articles is intended and may hopefully be seen as a small step towards the elaboration of some such perspectives. The conference at which the papers in this volume were originally presented was held in the city of Örebro, Sweden, 26–27 March 2004, hosted by the University of Örebro with financial support from the Nordic Council for Social Science Research (NOS-S). It is indeed a pleasure to see those papers and speeches enlarged and updated and finally brought together in a book. The work of accomplishing this has indeed been an interesting experience.

[2] The increased general importance of constitutional traditions is shown by the case Omega Spielhallen GmbH, C-36/02, ECR 2004 I p. 9609.

Chapter II

The EU Constitution Viewed in the Light of Fundamental Constitutional Theories

Ola Zetterquist*

Introduction

This paper is concerned with some fundamental constitutional theories applied to the constitutional law of the European Union. The theories will be viewed from the perspective of political philosophy and it will be a citizen's perspective of these issues, rather than a public international law or an internal community law perspective that will be taken. In particular the paper will look closer at two important theories that, so I will claim, can be identified in the constitution of the European Union. They are the theories of *popular sovereignty* and *constitutionalism* respectively. These theories have been chosen for two reasons: Firstly they make up the core elements of what we might call the *Western theory* of political society in general. Secondly they reveal rather interesting differences when we apply them to the European Union. The paper

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