

Ulrich Haltern, *Europarecht und das Politische*. Tübingen: Mohr Siebeck, 2005. 640 pages. ISBN 3-16-148704-4. EUR 114.

Europe is in great trouble. It could have been so nice. There was a constitution that would bring the European Union many steps forward. Alas, the referenda in France and the Netherlands – in which countries a majority rejected this constitution – have brought the EU to a standstill. There is much to say about these referenda. In my own country, the Netherlands, it was the first referendum ever held. The Dutch people are not accustomed to referenda. Furthermore the classic mistake with referenda was made. A referendum must contain a clear question that can be answered by “yes” or “no”. The question “do you agree with the European constitution” is not a clear question. On such a question many answers are possible. However, there obviously exists a basic reason for all these negative answers: the lack of legitimacy of the EU. There is not enough support among the peoples of Europe for the growing institutionalization of the EU. How can we solve this problem? Possible solutions are under discussion at the moment. The most anti-democratic way to overcome the stagnation is to organize new referenda in France and Holland: you shall vote till you agree! Working provisionally on the basis of the Treaty of Nice is a better possibility; reducing the constitution to the necessary rules and make it more acceptable that way, is another possibility. Whatever way is chosen, the main problem is still there: the lack of legitimacy of the EU. Ulrich Haltern devoted a comprehensive study to this question. This study was accepted in 2003 as *Habilitationsschrift* (second dissertation) by the Faculty of Law of the Humboldt University in Berlin.

Is (the lack of) legitimacy (also) a legal problem? Is it not more a matter of political science or more precisely of political psychology? That is the first question Haltern deals with. He emphasizes that such questions not only belong to the domain of political science. The study of law has to be more than how to improve law in daily life. He suggests a cultural theoretical approach, which aims to study legal phenomena in its cultural context. This approach does not consider law as a system of norms which influence the society from outside, but as a perspective on “*das Politische*”. He suggests a political psychology with three basic notions, forming a matrix with three poles: reason (*Vernunft*), interest (*Interesse*) and will (*Wille*). Among these three poles the political element oscillates, and its meaning will differ depending on time, space, perspective, view and context.

The first notion with its roots in Greek philosophy, deals with the question how to organize the political community in a reasonable way. The aim is to create justice. “Interest” is another notion. Only a political community that takes care of the interests of its members can be accepted by them as legitimate. In every period of history all three elements play a role in the experience of “that which is political”, but with a different weight. Since the Enlightenment “interest”, combined with “reason”, plays a leading role, as in liberalism, the dominant political theory of our time. Political philosophers standing in that tradition, like Hobbes, and in our time Rawls, try to combine “interest” and “reason” on the basis of a social contract, marginalizing the “will” at the same time.

What does Haltern mean by “will”? He sketches in a fascinating survey the background of this notion. I will not summarize it here, but only mention this. For Haltern the “will” is the will of the sovereign. A political community is based on the will of the sovereign. Originally the king was the sovereign. In the king, the State was concentrated. He embodied in the true meaning of the word the *corpus mysticum* of the State. By the way, this notion lay behind the famous words of Louis the XIV “L’état, c’est moi”. After the French Revolution the sovereignty was consigned to the people, so since then we speak of the sovereignty of the people. This sovereignty remains a mystery (*mysterium*), because people can not see or touch it. The will of the people, the sovereign, creates a political community that people have to believe in (*Glaubensgemeinschaft*). Only this belief gives the idea of “my” or “our” community with its common past, history and culture. Only this community can claim loyalty and can ask for sacrifices.

Here we come to the heart of the matter. As Haltern emphasizes, the will of the sovereign plays no role in the EU, because there is no sovereign. There is no sovereign, because there is no European people in which that sovereignty is consigned. There are only "... peoples of the States brought together in the Community ...", as Art. 190 EC states. The non-existence of a European people is therefore the basic problem and main reason of the lack of legitimacy. The European citizens do not consider the EU as "their" political community and do not have consequently feelings of loyalty towards it. The EU finds its place between reason and interest. The original enthusiasm of the founding fathers of Europe has faded away. The EU has become a technocratic institution.

The second part of Haltern's book is called "European Law in Transition?" It is obvious that the case law of the ECJ has been essential for the formation of the EU. In four chapters Haltern investigates the question whether this case law has brought the EU to another position in the political matrix (reason, interest and will), from a community of interest more in the direction of a community of will. For this investigation he chose four different fields in the case law of the ECJ: free movement of goods, judicial protection of individuals, fundamental rights and EU citizenship. These four fields range from economic to non-economic. The result of his investigation is that, although the case law of the ECJ in the beginning was located in interest, recent case law is more open to the "will" aspect, especially that on the citizenship of the EU. Two aspects are important here, equality and solidarity. Being a citizen of the EU means being part of a community that guarantees equality and mutual solidarity. The ECJ treats people not as citizens of a Member State or belonging to one of the peoples of Europe, but merely as individuals. If people in the EU started to feel themselves part of a community of equality and solidarity, that could be the start of the emergence of a real political community. The question is of course – as Haltern emphasizes – whether the people in Europe are ready to consider Europe as such a political community and whether they are prepared to give loyalty to it. Together with Haltern, I very much doubt if that will happen soon.

In his last chapter "The Will of Europe: That which is political and post-political" Haltern forms his conclusions. Basically there are two directions the EU can follow. The first is to try to create a real political community for its citizens. In the short and medium term such a community is not likely to develop. A change of case law of the ECJ is not enough. Such a political community would only be possible if the citizens of the EU are ready to consider the community as "their" community and feel themselves part of a European nation, like the different nationalities in Switzerland feel they belong to the Swiss nation. I see two complications. In the first place, there is not even the beginning of a European nation. The membership of the EU is too much a matter of mere political calculation. So Switzerland and Norway are clearly part of the European culture and history, but they are not Member States of the EU. New Member States were actually welcomed as members of a group of countries congregated around the same economic interests. The feeling "we are one people" as existed at the reunification of Western- and Eastern Germany was and is totally absent. The second problem in my opinion is the uncertain future of the EU. Member States like the United Kingdom do not want more than a cooperation of States in certain fields; the UK will not be part of a new State in the form of a federation. On the other hand, the EU develops documents that seem primarily to belong to States, e.g. a constitution, (which in fact is not more than a treaty). People feel confused; it is like sitting in a high-speed train without a clear destination.

Haltern offers another possibility. If a real political community in the short and medium term is not possible, than the change in the case law of the ECJ offers probably a way out. He suggests seeing the EU as a community of consumers (a post-political community). He emphasizes that a culture of consumption is neither narcissistic nor hedonistic. The consumer looks not only for material goods, but for histories, feelings and values as well. The EU is an open society in which you can travel anywhere, where you can have contact with many people, exchanging goods, but also opinions, ideas, values. For him the EU is a *civitas*

peregrina which gives – I say it in my own words – its citizens – travelling around more and more without roots – a certain hospitality by offering an open market of consumption and a certain safeness by mutual solidarity. The national State can not guarantee the interests of its people any more. So probably at the end of this process a new form of political entity will emerge.

This idea is interesting and I believe that it will become true, anyhow. On the other hand, as Haltern underlines at several places in his book, do we not expect too much from the EU? In an, from a historical point of view, amazingly short period, a union is created of States which were deadly enemies for centuries. Probably the best thing we can do is to work further on a confederation of States, based on mutual interest and solidarity, not pretending to be a State; and let us bide our time. Haltern wrote a fascinating book, which goes into depth. My short review can not do justice to a book of 600 pages. Hopefully it will stimulate to read the book. It will supply a lot of original and interesting ideas on a very topical theme.

Gerard van Wissen
Amsterdam