

Prologue

Examining European constitutionalism

This is a book about the theoretical bases of the European constitution. The book adopts a constitutional perspective and employs constitutional vocabulary. These are not innocent choices but predetermine how the EU and its law will be portrayed. In another conceptual framework, the issues raised and their interrelations would be conceived of differently. This is a token of the inevitable perspectivism which imbues all law but is particularly pronounced in EU law.

By my choice I do not negate the possibility of alternative portrayals, produced from other perspectives and relying on other conceptual frameworks. Thus, I will not ignore the international law connections of European law,¹ but I will subordinate them to my constitutional point of view. Adopting an international law framework, the order would be reversed: constitutional features would be inserted in an international law setting. Two main perspectives and four main conceptual frameworks are available for a legal scholar who aims at a comprehensive, theoretically oriented depiction of European law and polity: the perspectives of Member State and European law, and the conceptual frameworks of international, federal, administrative and transnational law. My perspective will be that of European law. International law and administrative law accounts may include a constitutional aspect, but they both tend to

¹ I shall use 'European law' as a generic concept which covers pre-Maastricht law of the European communities with the emphasis on the Treaty on the European Economic Community (TEEC); post-Maastricht Community and third-pillar law; post-Lisbon EU law; as well as various international law complements to primary and secondary Community and Union legislation. Correspondingly, 'European constitution' and such derivatives as 'European constitutionalization' and 'European constitutionalism' will cover all the diverse stages of European law.

reject the autonomous constitutional claims of European law and reduce constitutionalism to state constitutionalism. Due to the juridical constitutionalization driven by the European Court of Justice (ECJ) and the constitutional self-understanding its case law reflects, such a rejection is difficult to defend from the perspective of European law. After adopting this perspective, the remaining alternatives are the federal and transnational. I shall opt for the latter, because I think it best captures the particularities of the EU as a polity and a legal system. However, opting for one conceptual framework should not entail blindness to contributions employing another approach. Discursiveness is not only a descriptive characteristic of European law (see Chapter 4) but also a normative guideline which should govern scholarly efforts to catch the specificity of European law. Availability of diverse conceptual frameworks manifests the controversial nature of the theoretical foundations of the European constitution. This is one of the peculiarities of European constitutionalism with which we shall become familiar in the course of this book. But scholarly confrontations involving diverse disciplinary premises should not be seen merely as hegemonic contests; they also contain potential for mutual learning.

Modern constitutional theory has been elaborated in the context of modern states and their national legal systems. In order to speak of ‘constitutionalism beyond the state’,² we should be able to demonstrate that, for instance, the EU as a polity and a legal system displays sufficient similarities with its state counterparts to warrant a common constitutional approach and vocabulary. We cannot perceive the object of our study but through a particular conceptual framework. However, we are of course not free to adopt any framework whatsoever; if our concepts restrict how we see the object, the object sets restrictions on our conceptual and methodological freedom. It would not make much sense to apply to European law, say, the conceptual apparatus of quantum mechanics. In this Prologue, I will point to some central features which European constitutionalism shares with its state equivalents and which justify employing constitutional language in the first place: such as the idea of constitutional law as a higher law. But I will also briefly evoke some of the particularities of European constitutionalism that complicate transferring constitutional concepts from state to European level. These include the multidimensionality and still emergent and process-like nature of the European constitution.

² Cf. J. H. H. Weiler and M. Wind (2003).

The term ‘constitutionalism’, appearing in the very title of this book, is in need of explication. ‘Constitutionalism’ is often used, especially by American authors, in a thick normative sense, referring to vital elements of the American notion of a constitutional democracy and the European notion of a democratic *Rechtsstaat*, such as democracy and fundamental rights. In this conceptual setting, ‘constitutionalism’ is intimately linked to legitimacy: ‘constitutionalism’ implies that the legitimacy of a polity and its law should be achieved through democratic procedures and fundamental rights.³ Another related reading connects ‘constitutionalism’ to constitutional culture. Joseph Weiler has claimed that a characteristic of the European Union is a ‘constitution without constitutionalism’.⁴ Here ‘constitutionalism’ alludes to the general political culture among the citizenry which supports a polity and a legal system based on the principles of a constitutional democracy or a democratic *Rechtsstaat* and secures their legitimacy.

A thick concept of constitutionalism is implicit both in the debate on constitutional pluralism and the administrative law depiction of the EU and its law, most forcefully propounded in recent years by Peter Lindseth. Its problem is that it reflects the persistent dominance of the state template of constitutions and hence risks blocking the view to the specificity of European constitutionalism. It focuses on the juridical and political constitutions, and tends to neglect sectoral constitutionalization, a distinct feature of European constitutionalism which corresponds to the basic teleological, policy orientation of European law. I shall use ‘constitutionalism’ in a normatively more neutral sense. By ‘European constitutionalism’ I simply refer to the particularities of the European constitution and its theoretical foundations. I do not deny the relevance for European constitutionalism of the normative ideas of a constitutional democracy (a democratic *Rechtsstaat*) or the conception of legitimacy they imply. Where there is power it must be legitimated and restricted, and where there is law – which always implies power too – it must also be legitimated and restricted. But I stress that efforts to secure what Lindseth calls democratic and constitutional legitimacy should be examined through the interaction between the transnational and national levels of constitutionalism. In some crucial respects, European constitutionalism

³ D. Halberstam (2009, 2010 and 2012) identifies constitutionalism with limited self-governance. In turn, P. Lindseth (2010) connects constitutionalism to democratic and constitutional legitimacy.

⁴ J. H. H. Weiler (1999), p. 298.

has been, and still is, parasitic on national constitutionalism, and this also holds for constitutional and democratic legitimacy.⁵ In order to be able to catch the specificity of European constitutionalism, we should not burden our basic concepts with normative assumptions that are too demanding. This goes for the very concept of a constitution too. To justify the use of constitutional vocabulary, European constitutionalism must be shown to display, not only divergences from, but also similarities to national constitutionalism. European constitutionalism and state constitutionalism in its diverse national variants express different conceptions of a shared concept of a constitution.

An obvious objection exists to resorting to constitutional vocabulary in the European context: namely, the fate of the Constitutional Treaty. Can we any longer talk of a European constitution after the failure of the Constitutional Treaty, following the debacle of the referenda in France and the Netherlands? Has not European citizenry rejected the idea of European constitutionalism?

The failure of the Constitutional Treaty attests to a wide discrepancy between the legal and political culture of the European elites and of the general public. In constitutional scholarship, much energy has been spent to detach the concept of a constitution from its state template and to demonstrate its viability in a transnational law – and even in an international law – context too. However, constitutional vocabulary seems to meet resistance among European citizenry. In their constitutional enthusiasm, the elites easily think that constitutional rhetoric will contribute to the general legitimacy of the EU as it does to the legitimacy of the national political and legal system. This seems to have been a misjudgement. European citizens often enough experience European constitutionalization more as a threat than a promise. In general legal and political culture, the constitution appears to remain inseparably linked to the state. Thus, the constitutionalization of the EU was commonly seen to lead to the EU acquiring state-like, federal attributes. And this is not what the general public, which still invests its main political allegiance in the state, was willing to accept. As Neil Walker has suggested, at the cultural level a constitution can be analysed as a condensed symbol, as a symbolic frame of reference.⁶ But at least for the general public, it refers not only to

⁵ As P. Lindseth (2010) refuses to examine putative European constitutionalism in its interaction with national constitutionalism, he ends up by denying the justification for a constitutional depiction of the Union and its law.

⁶ N. Walker (2003), pp. 33–4.

human rights, democracy and the rule of law; it also refers to state and sovereignty.⁷

The European political and legal elites learned the lesson and deleted from the text of the Lisbon Treaty direct allusions to state-like attributes and constitutional vocabulary evoking federalist connotations. Was not this the final deathblow to the idea of European constitutionalism; a deathblow which even makes it questionable for scholars to employ constitutional language at all?

This question points to the general methodological issue of *double hermeneutics*, typical of human and social sciences. Through their concepts, scholars try to make sense of a piece of social reality which is moulded by the way the social actors themselves conceptualize and try to make sense of their social world. Due to inescapable double hermeneutics, the *meta-language* of scholars cannot drift very far from the *object language* of social actors whose ideas, behaviour or artefacts they are studying. Scholars share the culture they are examining; their meta-language draws from the same cultural reservoir as the object language under examination. A theorist may strive for and even attain a reflexive distance to surrounding culture, but reflexivity too is subject to cultural constraints.⁸

How should the relevant object language be defined for a study of the constitutional theory of the EU? As will be explained in Chapter 4, a constitution is brought about through constitutional speech acts, issued by relevant constitutional actors and linked together to make up a constitutional discourse. European constitutionalization cannot be separated from the constitutionalization of the discourse on European law and polity. Constitutional theorists are engaged in a *second-order*, meta-level discourse about the first-order discourse among constitutional elites. The meta-language of theorists should be attentive to the object language of first-order constitutional discourse; otherwise it would not do justice to

⁷ Of course many reasons may exist for rejection of the constitutional project by the general public and the failure of the referendums in France and the Netherlands, some of these perhaps connected more to national politics than the development of the EU. I do not claim that the links which in general constitutional culture are seen between constitution and state were the only or even the main factor; I only claim that these links played a non-negligible role. Here we should also be wary of sweeping generalizations: there certainly are differences in the political and legal cultures of different Member States with regard to the connection between constitution and state. Thus in federal states the idea of multilevel constitutionalism is perhaps easier to accept than in unitary states.

⁸ For a discussion on the object and meta-language of constitutional theory, see also N. Walker (2006a), pp. 10–14.

its object. Constitutional concepts have made their entry into the vocabulary with which legal and political actors express their descriptive and normative views of the past, present and future of European law and polity. Constitutional vocabulary has become part of the object language of the discourse which provides the source material for a constitutional theorist. But it is not the only vocabulary used, and other second-order conceptualizations can be defended as well. Yet what is important now is that the first-order discourse provides enough anchorage for second-order constitutional theory. The 'de-constitutionalization' in Lisbon does not alter this judgment. In a sense, the Lisbon Treaty was an insincere speech act, intended to pacify and even delude European citizenry: the main normative contents remained the same as in the abortive Constitutional Treaty.

The second-order point of view distinguishes legal and constitutional theory from *doctrinal* research. Together with contributions by the constitutional legislator and the ECJ as the constitutional court, doctrinal research is one of the main participants in the ongoing first-order discourse which drives forward the process of European constitutionalization. Next to the ECJ, legal scholarship has borne the main responsibility for elaborating the doctrine through which Treaty law is interpreted and, in some instances, even complemented. Here the dual citizenship of legal scholarship is evident: legal scholarship, in particular doctrinal research, is not only an academic but also a legal practice, fulfilling important functions in the legal system and contributing to the production and reproduction of law; that is, its own object of research.⁹ Doctrinal research forms part of the discursive normative material in the focus of second-order theoretical studies. However, the distinction between first- and second-order discourse is far from watertight; theoretical accounts of the European constitution also possess normative implications to which first-order constitutional speech acts may relate.

In my examination of the theoretical bases of the European constitution, I am engaged in a second-order discourse in relation to the ongoing first-order discourse among European constitutional actors. But in a sense, my reconstruction represents a second-order discourse with regard to theoretically oriented constitutional debates as well. The European constitution possesses multiple dimensions, and in each of these dimensions discourse is conducted at both doctrinal and theoretical levels; consequently,

⁹ See my discussion of legal scholarship's dual citizenship in K. Tuori (2002), pp. 285 ff.

constitutional theory is also differentiated along constitutional dimensions. My approach to *dimension-specific constitutional theories* is reconstructive. In each of the constitutional dimensions, I try to excavate the basic theoretical disagreements but, mostly, I refrain from taking a position on rival views. My ultimate purpose is to contribute to a *general theory of the European constitution*, rather than to participate in dimension-specific debates which are an object for my reconstructive enterprise. Indeed, a general theory of the European constitution should address the contested nature which labels the theory underpinning both the sectoral constitutions and the framing juridical and political constitutions.

A general theory of the European constitution transcends the restricted perspectives of the diverse constitutional dimensions. Yet no bird's-eye view is available in constitutional theory either. A scholar elaborating a general theory of the European constitution necessarily proceeds from a particular point of view which directs the gaze and limits its view. A general theory of the European constitution, such as this book seeks to contribute to, adopts the perspective of European law. It must recognize the existence of the Member State perspective too, and attend to the pluralism of transnational European and national Member State law. But it approaches perspectivism and pluralism from the perspective of European law.

Exponents of constitutional pluralism have argued that their theorizing takes off from ground rising above the potentially clashing perspectives of European and national law.¹⁰ In effect, this would mean that theirs is a second-order theoretical discourse in relation to European and national discourses on the theories underlying the respective constitutions, including the general theory of the European constitution. Now at issue would no longer be the theory of a particular constitution but *general constitutional theory*. The pretension of constitutional pluralism of neutrality with regard to European and national perspectives has been contested from both sides. Those privileging the point of view of European law claim that constitutional pluralism implies acknowledging the reservations of national constitutional courts¹¹ in respect of European law's claim to supremacy and, consequently, favours the perspective of national law.¹² By contrast, those adopting the point of view of national law argue that as

¹⁰ See, e.g., N. Walker (2006a), p. 18.

¹¹ Not all Member States possess a constitutional court. When referring to national constitutional courts I also include supreme courts with constitutional jurisdiction.

¹² J. Baquero Cruz (2008), p. 414.

constitutional pluralism (unjustifiably) accepts the existence of European constitutionalism, it favours the perspective of European law.¹³ Thus, divergent notions of the perspectival commitments of constitutional pluralism provide yet another example of the impact of perspectivism on scholarship of European law.

A central task for general constitutional theory is to elaborate concepts which pin down general characteristics of constitutions and facilitate examining particular constitutions, including their theoretical foundations. In our present constitutional situation, ‘constitutional pluralism’ and other, more specific concepts pertaining to a pluralist constellation of overlapping constitutional claims of authority certainly belong to the conceptual reservoir of general constitutional theory. Although the main objective of this book is to reconstruct the theoretical bases of the European constitution(s), this requires forays into general constitutional theory as well. Both in this Prologue and in Part I, I discuss concepts with their domicile in general constitutional theory: such as ‘constitutional relation’, ‘constitutional function’ and, indeed, ‘constitutional pluralism’. In these discussions, my perspective surpasses that of European law. Yet general constitutional theory too is always conducted from a distinct legal cultural framework, which theorists of constitutional pluralism cannot dispense with either. This framework results only partly from conscious choice; to a large extent, it is a matter of unconsciously functioning legal *Vorverständnis*, impregnated by what I shall call the perspectivism of legal orders, roles and disciplines.

Although legal and constitutional theory distances itself from the ongoing first-order discourse which determines the ever-changing contents of the law in force, it shares the internal perspective on law. The ultimate impetus for European constitutionalization lies in extra-legal factors. Reconstructive constitutional theory should not ignore the external social influences – of, say, a political, economic or ideological character – which govern legal development. Yet its cognitive ambitions do not focus on causal, social-scientific explanations. Reconstructive constitutional theory nurtures explanatory aspirations merely in the sense of making constitutionalization processes intelligible and discovering their internal logic, if such a logic there be! The internal perspective of legal scholarship only captures external causal factors after these have been translated into the language of law and filtered through the internal workings of the legal system. Despite its cognitive and explanatory

¹³ P. Lindseth (2010), p. 266.

pretensions, legal and constitutional theory shares the normativity of first-order discourse. This is obvious with regard to dimension-specific constitutional theories, which have direct normative implications for the doctrinal level. However, these theories also imply a view of the societal object of constitutional law – an implicit social theory, as I shall call it – which adds to sectoral constitutional theories a descriptive and even explanatory flavour but does not negate their normative thrust. But nor can reconstructive constitutional theory avoid normative implications. Reconstructions always involve choices and are never normatively innocent.

A relational concept of constitution

Constitutional concepts are contested concepts of which rival conceptions exist. This holds for the very concept of a constitution too. A central premise of this book is that ‘constitution’ is a relational concept which refers to the *constitutional relation* between *constitutional law* and its object of regulation: that is, a *constitutional object*. In a state context, Niklas Luhmann, for instance, has proposed examining the constitution as belonging to both the legal and political sub-system of society and establishing a structural coupling between the two.¹⁴ Translated to my conceptual apparatus, Luhmann distinguishes between a juridical and a political constitution and points to their intertwinement; law-making, for example, is an operation in both the legal and political subsystems and regulated by both the juridical and the political constitution.

The European constitution also possesses a juridical and a political dimension. In the juridical constitution, constitutional law relates to the EU legal system and in the political constitution to the EU as a polity. In a typical state setting, political and juridical constitutions frame sectoral policies and legislation which, however, are usually left to the province of ordinary politics and law-making. By contrast, in a functionally oriented transnational polity, such as the EU, with a substantively limited claim to political and juridical authority, even central sectoral policies are constitutionally anchored. Hence, in addition to the two *framing constitutions* – the *juridical* and the *political* ones – I propose that we distinguish between three *sectoral constitutions*, all of them possessing a distinct constitutional object to which constitutional law relates: the *economic*, *social* and *security* constitutions. Furthermore, economic constitutionalization

¹⁴ N. Luhmann (2004), pp. 404 ff.

has proceeded in two sub-dimensions which merit separate analysis: a *microeconomic* and a *macroeconomic* one. The process-like character of the European constitution also enhances the need to distinguish between constitutional dimensions and the inclusion of sectoral constitutions among them. The constitutional dimensions have emerged at different times and developed each at their own pace. This calls for a differentiated analysis of the European constitution as a *process of constitutionalization*.

Thus, unlike a standard state constitution, the European juridical and political constitutions do not frame merely ordinary policy- and law-making but its constitutional foundations as well; that is, sectoral constitutions. The framing function of the juridical and political constitutions points to another aspect of the relationality of the European constitution complementing the constitutional relation between constitutional law and its object: an *inter-dimensional* relationality.

So the European constitution actually consists of many constitutions. But there are many constitutions in Europe in another and perhaps more familiar sense as well. European constitutional space is a crowded space, inhabited by both Member State national constitutions and the European transnational constitution and, consequently, characterized by constitutional diversity and pluralism. The European constitution must always be examined in its interaction with its national counterparts. This interaction is also an important aspect of the relationality of the European constitution.

Constitutional law as higher law

The constitution occupies a particular position in modern law: it represents a higher law, the law of laws. The idea of a higher law can be linked to the conceptual distinction between the formal and material constitution, familiar from the writings of, above all, Hans Kelsen. The concept of *formal constitution* refers to the legal form and status of constitutional norms: to their codification into a single legal act and their position in the hierarchical order of legal norms. In turn, the concept of *material constitution* evokes the typical contents or functions of constitutional norms and is thus specified in accordance with what these are held to be. For Kelsen the main function of a constitution is to regulate the production of new legal norms, and this view, then, shaped his conception of ‘material constitution’.¹⁵ The norms making up the constitution in the material sense may, but need not, be codified in a single statute (a constitution

¹⁵ H. Kelsen (1989), p. 222.