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Introduction

> The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist.[1]

This book provides a theory for constitutional lawyers about *fundamental questions of European constitutional law*.[2] My intention was: (1) to present a map (or a structured and concise overview) of the immense literature on these questions; (2) to show in an intelligible methodological manner my own answers to these questions; and (3) to demonstrate the practical relevance of constitutional theory by presenting concrete examples of its application and by showing how different theoretical answers (presuppositions) lead to different legal solutions.

Before beginning the actual enquiry, it is necessary to clarify the methodological presuppositions of the work, which I believe distinguish this book sharply from similar ones in the field. To a certain extent, a major part of this book itself is about the method of (how to pursue a discourse on) constitutional law,[3] but to go one abstraction level higher and to analyse the 'method of the method' would necessarily lead to very

[1] John Maynard Keynes, *The General Theory of Employment, Interest and Money*, London, Palgrave Macmillan 1936, 383.

[2] I am grateful to Paul Behrens, Paul Blokker, Armin von Bogdandy, Péter Cserne, Arthur Dyevre, Tamás Győrfi, Marek Hrubec, Zoltán Novák, Howard Schweber, Jiří Přibáň, Pál Sonnevend, Esther Vogel and Hans Vorländer, in addition to the participants of the MPI Heidelberg weekly workshop on 26 February 2013, to the participants of the PPKE BTK Constitutional Culture conference in Budapest on 14 November 2013 and to my colleagues at the Institute for Legal Studies at the Centre for Social Sciences of the Hungarian Academy of Sciences for critical remarks.

[3] On constitutional theory as the analysis of the methods of constitutional law enquiries, see Helmuth Schulze-Fielitz, Staatsrechtslehre als Wissenschaft, in: *id.* (ed.), *Staatsrechtslehre als Wissenschaft*, Berlin, Duncker & Humblot 2007, 11–48, especially 14. I strongly disagree with Gustav Radbruch, *Einführung in die Rechtswissenschaft*, Stuttgart, KF Köhler Verlag [12]1969, 253, according to whom it is a sign of the sickness of an academic

general philosophical issues, which we need to minimise here. This is not a book about legal epistemology. The following pages should, therefore, be understood rather as revealing presuppositions than as proving their truth. Their ambition is just to provide a theoretical context to the following chapters.

1.1 Constitutional theory as a language suggestion for a constitutional discourse

If we do not want to pretend that legal expressions have some kind of ontological 'essence', then we have two ('anti-essentialist') options: either (1) we should view their meanings as their role played in the constitutional discourse (*description* of the meanings of legal terms),[4] or (2) we should recognise that the definition and re-definition of constitutional concepts are never just descriptions, but they are rather *suggestions* about their meanings which are consistent with our political preferences. The latter option, which I believe is nearer to the reality of constitutional discourses than the first one, means that there is an ongoing political struggle over who defines concepts and how,[5] and concepts are viewed something like squares on a chessboard which can be occupied (by our own, strategically designed definitions) in order to have a better position than our (potential) opponents. Thus, when we 'describe' the constitutional concepts, we actually do not just *de*scribe them but rather implicitly *pre*scribe a use which favours our political preferences (be it emotional-ideological preferences or interest preferences).[6] This constitutional discourse has three types of participants in my simplified model: politicians, scholars and judges. These all have different types of interactions or interwovenness, and they all have different ranks of importance in different countries, but from time to time they are all inspired or even forced by the people (as an extraordinary, fourth participant) to alter

discipline if it is concerned with its own method. A certain level of concern is quite healthy, the question is rather that of proportions.

[4] Cf. more general Ludwig Wittgenstein, *Philosophical Investigations*, Oxford, Blackwell 1953, 43. For an application of this idea to general legal concepts see HLA Hart, Definition and Theory in Jurisprudence, *Law Quarterly Review* 70 (1954), 37–60.

[5] Pierre Bourdieu, La force du droit. Éléments pour une sociologie du champs juridique, *Actes de la recherche en sciences sociales* 64/9 (1986) 3–19, especially 4.

[6] At the end of the day, most of these interpretation struggles *(Deutungskämpfe)* will be decided by the constitutional court (or supreme court) of the given legal order, see Hans Vorländer (ed.), *Die Deutungsmacht der Verfassungsgerichtsbarkeit*, Wiesbaden, VS-Verlag 2006, with further references. See also below the introductory text to Part B.

their own discoursive behaviour, for instance, through elections or through constitutional complaints.

I will refer to some of the most important legal expressions as '(legal/constitutional) key concepts', deliberately ignoring the possible difference between 'expression' and 'concept' because of the already mentioned anti-essentialist methodological presupposition.[7] The key concepts are chosen according not only to their frequency of use, but also to their centrality in either explaining other concepts or in justifying constitutional norms (if we see concepts as a network, then they would be the major nodes). They are not necessarily often mentioned (as a matter of fact, most of them are very often mentioned, but that is not the point), but they would be or could be mentioned if you asked enough questions in order to find the key concepts of the discourse.

The task of *constitutional theory* is to suggest a *language* for the discourse on constitutional law. Language, in the sense used here, comprises a list of key concepts,[8] the meaning of these key concepts[9] and the grammar of the discourse (i.e., what constitutional reasoning looks like).[10] None of these elements is entirely objective; they all imply a certain political vision (see below *1.2 The political nature of constitutional theory*). The language therefore is necessarily (at least partly) normative, but it also has to fit the current discourse (as it does not intend to be the language of a fictitious constitutional discourse, but wants to shape the current one).[11] Constitutional theory is thus an advice (and the

[7] For a similar view see Michael Stolleis, *Rechtsgeschichte schreiben. Rekonstruktion, Erzählung, Fiktion?,* Basel, Schwabe 2008, 25; *id.*, *Rechtsgeschichte als Kunstprodukt. Zur Entbehrlichkeit von 'Begriff' und 'Tatsache'*, Baden-Baden, Nomos 1997, 12.

[8] Participating in the constitutional discourse and even creating a constitutional regime itself mean the acceptance of a very specific language with its key words and conceptualisations, see Howard Schweber, *The Language of Liberal Constitutionalism*, Cambridge, Cambridge University Press 2007.

[9] As to this second element of the language, I was highly inspired by the work of Christoph Möllers, *Staat als Argument*, München, CH Beck 2000. I am indebted to Armin von Bogdandy who placed this book into my hands ten years ago (when I was just about to begin writing an essentialist *Staatslehre* which, as I realised through Möllers' book, was an absolutely futile idea) and to Christoph Möllers with whom since then I have had the opportunity to personally discuss methodological issues of constitutional law.

[10] The latter could be decoded for German ears approximately as 'Metatheorie der Verfassungsdogmatik', see Martin Morlok, *Was heißt und zu welchem Ende studiert man Verfassungstheorie?*, Berlin, Duncker & Humblot 1988, 52–55.

[11] Even though I see in many aspects law as a discourse, this work shares hardly any of the theoretical presuppositions of Habermas's discourse theory. My theory is much more fragmented and sceptical, it does not contain any master plan (see below *1.3 The role of historical and sociological knowledge*), and its implied anthropology is much less

constitutional theorist is the advisor) as to the terminology of constitutional law, that is, how to conceptualise constitutional issues.

The structure of the book is, partly following from the above definition of *language*, going to be tripartite. In the first major part (Part A), I am going to analyse the general rules (or the grammar) of the constitutional discourse, that is, the rules of constitutional reasoning.[12] In the largest and most important part (Part B), an analysis of the different conceptualised responses ('key concepts') will be given. And finally, I will collect some conceptual dead-ends in Part C.

1.2 The political nature of constitutional theory

Constitutional lawyers are often accused of being politically biased[13] and, to be fair, for good reason. Constitutional lawyers are, and ought to be, politically biased (or to put it nicely: they should not be politically neutral). However, they should only be political in a very specific narrow sense: they ought to have a political vision.[14] Without a political vision, key concepts of constitutional law (democracy, the rule of law, etc.)

optimistic as to the rationality and morality of humans, than that of Habermas. My theory is normative only in the sense that it hopes to influence the European constitutional discourse and indirectly also European politics, but it is not meant to be a moral philosophy (even though it does imply certain moral assertions). My anthropological views are near to those of Anthony Quinton as exposed in his *The Politics of Imperfection*, London, Faber & Faber 1978.

[12] For a similar grammar metaphor see Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, Cambridge, Cambridge University Press 2005, esp. 562–617. I differ from Koskenniemi's view, however, on several points: (1) He uses a wider concept of grammar, which also includes the 'grammar of concepts', and he considers the description of the whole argumentative practice as 'grammar': according to his terminology, the present book should have been entitled the 'Grammar of European Constitutional Law'. (2) I do not share his critical-emancipatory normative ambition, I rather consider this work as an intellectual contribution to European institution-building. (3) Consequently, I provide a more constructive approach, as I am always suggesting a certain interpretation instead of just rejecting others. For a narrower understanding of the concept of 'grammar' including only rules of reasoning, like the concept of the present author, see Jack M Balkin – Sanford Levinson, Constitutional Grammar, *Texas Law Review* 72 (1994) 1771–1803.

[13] On the tendency of political insinuations, see Hans Peter Ipsen, Die deutsche Staatsrechtswissenschaft im Spiegel der Lehrbücher, *Archiv des öffentlichen Rechts* 106 (1981) 161–204, especially 198.

[14] Cf. Rudolf von Laun, Der Staatsrechtslehrer und die Politik, *Archiv des öffentlichen Rechts* NF 2 (1922) 145–199, 174 stating that a constitutional lawyer without a political vision is 'ridiculous' *(lächerlich)*. For a similar conclusion, with different terminology, see David Robertson, *The Judge as Political Theorist*, Princeton, Princeton University Press 2010.

cannot be meaningfully interpreted, and borderline cases (or cases that have never come up before) cannot be decided in a predictable manner. Without a political vision, you either obtain absurd results through legal formalism, or you end up making arbitrary decisions. Political visions are often unconscious or fragmentary, very vague and even sometimes purposely hidden, but they are normally there, and rightly so. Sometimes you hint at them, but even more often your discoursive opponents try to debunk them in order to discredit you.[15] But you do not speak about them openly in detail *as a lawyer*, because that would undermine your social role. If the matter of the debate is the political vision, then political theorists (political philosophers, political scientists) are better qualified and politicians have more legitimacy to speak than lawyers. But I believe that lawyers do have an important role: they tame ideological and political conflicts by transforming them into technical-legal issues (and this transformation is ideally enforced by the institution of judicial review of statutes). When lawyers talk about the solution of a case, they do not mention who is morally good or bad, smart or stupid, fascist (communist) or democrat, nice or ugly, corrupt or clean (unfortunately, all too often, these are debatable and instrumentalisable categories), but they refer to legal texts, and in our case, to constitutions. They refer to constitutions because these are, normally, fixed points. Of course, their interpretations can differ hugely, but again we have (unwritten) rules about how to deal with this. Constitutional discourse by scholars and judges is therefore functionally superior (as it tames politicians by providing a behavioural framework for them, which will then be institutionally enforced by constitutional courts or supreme courts),[16] but also more formalised (as it has more discourse rules) than the usual everyday discourse of politicians. Constitutional lawyers (even though their job is political) have to distance themselves from everyday politics, primarily by the way they speak about political issues (i.e., via references to constitutional law), but also through remaining outside of everyday

[15] In order to ease the job of my critics, I would hint at the following political vision behind many of my writings (including most chapters of this book): 'a federal Europe (meaning the European Union) which is a strong contestant on the political and economic world stage and which is based on its common constitutional traditions'. On how the rule of law, constitutionalism and democracy make economic development more likely (and step-by-step even change the mentality of peoples), see Daron Acemoglu – James Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, New York, Random House 2012, especially 302–334.

[16] This means both influence and responsibility, see Andreas Voßkuhle, Die politischen Dimensionen der Staatsrechtslehre, in: Schulze-Fielitz (n. 3) 135–158, especially 138.

party politics.[17] If they participate in everyday party politics, they should do it openly, and they should make it clear that they do not do it as constitutional lawyers, as otherwise they are abusing their standing and endangering the fulfilment of the social function of their fellow constitutional lawyers.[18] Thus constitutional lawyers have to be political, but they should not interfere with everyday politics, and they should follow certain discourse rules when speaking up.

Constitutional theorists might even be one degree more political than constitutional lawyers,[19] because constitutional theorists have the ambition to form the thoughts of constitutional lawyers and to advise them about how to argue in the constitutional (scholarly or judicial) discourse.[20] The nature of the job of a constitutional theorist is thus somewhere between that of (a) a constitutional lawyer and (b) a political philosopher, but his or her task is different from any of the other two.

Ad (a). A constitutional theorist's job is different from that of a constitutional lawyer, because: (a/1) s/he also has to work on a theoretically more abstract level than constitutional lawyers; *and* (a/2) s/he has to be able to sell his/her ideas to the constitutional lawyers by showing their concrete relevance for the solution of cases.[21] A constitutional theorist advises constitutional lawyers about the language which they should use in their discourse. The discourse itself is carried on by constitutional lawyers (judges or scholars), but the communication advisors are constitutional theorists (even if sometimes constitutional theorists cannot resist the temptation to take part in the actual constitutional discourse too). Constitutional theory itself is also a discourse: a discourse about a discourse (or to put it nicely: a meta-discourse), a reflection about what the constitutional law discourse should look like, what constitutional language it should use.

Ad (b). A constitutional theorist's job is also different from that of a political philosopher as well, because: (b/1) s/he also has to connect the

[17] Voßkuhle (n. 16) 153–157.
[18] Michael Stolleis, *Staatsrechtslehre und Politik*, Heidelberg, CF Müller 1996, 26–27.
[19] On the political nature of constitutional theory see Morlok (n. 10) 178 and (with a different terminology) Nicholas William Barber, *The Constitutional State*, Oxford, Oxford University Press 2010, 1–16 and TRS Allan, *The Sovereignty of Law. Freedom, Constitution, and Common Law*, Oxford, Oxford University Press 2013, 1–16, 333–349.
[20] Thus indirectly, constitutional theorists form constitutional law itself, see Morlok (n. 10) 81.
[21] I strongly disagree with Helmuth Schulze-Fielitz, *Der informale Verfassungsstaat*, Berlin, Duncker & Humblot 1984, 151 and with Morlok (n. 10) 52 according to whom, constitutional theory is not developed in order to solve cases. It should be developed in order to solve cases, but in a more indirect way than concrete doctrinal analysis. Without this (at least indirect) ambition, the outcome of the analysis remains unclear.

abstract political ideas to the legal discourse by translating them into the more rigid (because being legally fixed) constitutional language, and consequently, his/her choice of terminology is rather limited; and (b/2) finally, bearing in mind the non-philosopher audience, philosophical issues have to be slightly simplified, especially if they are not directly essential to the actual thesis.

Now, after we have clarified the nature of the job of constitutional scholars (be they constitutional lawyers or constitutional theorists), an additional question arises: whether we should speak about it. Sometimes the truth should remain unspoken. We do not tell our neighbour that he is fat (even if he is), and we do not tell a scholar friend that his book which has just been published is useless (even if it is). Some might think that the ideology of perfect neutrality (even if everybody knows it is not really true) might contribute to the healthy running of the constitutional machinery: rhetorically confirming neutrality (e.g., stating that 'constitutional scholars are just the mouthpiece of the constitution') might be a lie, but a sweet, little and, most importantly, necessary lie. I think this would be a mistaken position to take. If constitutional scholars pretend to be fully neutral, then they are vulnerable to bold debunking exercises by destructive critical scholars, who then justify their own abuse of constitutional law for everyday party politics with reference to the general political nature of constitutional scholarship. Nevertheless, we should differentiate between the general political nature of the job and the melding with everyday politics. It is better to admit openly a certain general type of political attachment (i.e., attachment towards the values of constitutionalism), in order to be able to detach from the everyday business of politics. Without this detachment, constitutional lawyers cannot plausibly determine the framework of everyday politics, cannot tame it; and without this detachment, constitutional theorists cannot plausibly advise constitutional lawyers about the language which should be used to fulfil this task.

1.3 The role of historical and sociological knowledge

We can perceive constitutional key concepts in two distinct ways. One is to trace them back to (or justify them with) certain general moral principles, like human dignity or equal freedom (i.e., to see a unified teleological masterplan behind all the key concepts of constitutional law). The other is to view them as historical responses to social challenges.

I believe in the latter path and think that even moral ideas can be explained as long-term default responses to social challenges.[22]

Following Toynbee, I view societies (including European societies) as facing – from time to time – new historical challenges, to which they try to find the right responses.[23] A challenge in this context means a new situation or problem[24] (even a bold response to a former challenge), which cannot be solved by the methods known to that society, but which makes creativity necessary. This creativity can mean technical innovation or the introduction of new ideas on how to organise society (my emphasis here lies with this latter issue).[25] If the technical innovation or the new idea was not the right one to tackle the problem (wrong response), then the society (culture or nation) in question stagnates or even declines until the right response is found (or loses its distinctive identity and is dissolved in another).

The language of constitutional law itself is a type of answer to different historical challenges.[26] If we want to use this language consciously (and if we want to be able to reject certain parts of it), then we have to know the original historical and sociological context in which a constitutional-conceptual innovation arose. We are going to return to this methodological problem in more detail in the introduction to Part B, and I also hope that when we consider our *concrete* topics, that is, constitutional key concepts in Part B, these *abstract* methodological issues will become clearer as well.

[22] Richard A Posner, *The Problematics of Moral and Legal Theory*, Cambridge, Mass., London, Belknap Press of Harvard University Press 1999, 17–38.

[23] Arnold J Toynbee, *A Study of History*, vol. I, London, Oxford University Press 1933, 271. While different aspects of Toynbee's work have been subject to justified criticism (especially the role of religion, the relationship between civilisations, certain concrete historical details), his basic scheme of challenge-and-response does seem to fit the historical facts. For an account of recent literature on Toynbee see Marvin Perry, *Arnold Toynbee and the Western Tradition*, New York, Peter Lang 1996, especially 103–128; for a good introduction to his work see CT McIntire – Marvin Perry, Toynbee's Achievement, in: CT McIntire – Marvin Perry (eds.), *Toynbee. Reappraisals*, Toronto, University of Toronto Press 1989, 3–31; for classic literature on him (and some of his own methodological essays) see MF Ashley Montagu (ed.), *Toynbee and History. Critical Essays and Reviews*, Boston, Porter Sargent 1956.

[24] On wars as challenges to the constitutional systems and on modern constitutional solutions as responses to wars (or to the threats thereof) see Philip Bobbitt, *The Shield of Achilles. War, Peace, and the Course of History*, New York, Anchor 2002, 69–209.

[25] See András Sajó, *Limiting Government. An Introduction to Constitutionalism*, Budapest, New York, Central European University Press 1999, 1–7 on constitutional ideas as expressions of what kind of past experiences the constitution-giver wanted to avoid.

[26] On the role of historical knowledge in understanding contemporary constitutional key concepts see Gustavo Zagrebelsky, *Historia y constitución*, Madrid, Trotta ^{2}2011.

1.4 Why 'European'?

This is not a general (or universal) constitutional theory in a geographic sense. On the one hand, it is debatable whether it is possible to write a general constitutional theory at all.[27] There is a universal constitutional discourse (both judicial and scholarly), but it is definitely not as dense as the European one.

On the other hand, however, it is also not the constitutional theory of just one single state.[28] Its geographic ambition is much broader, and it attempts to develop a constitutional theory for Europe. For different reasons, it seemed possible to have a common constitutional theory for Europe: (1) The role of law in the political system (especially the 'rule of law') connects these legal systems together (as compared to China or Africa). (2) The social challenges are similar (e.g., multi-ethnic democracies in post-industrial societies). (3) European integration (including the law of the European Convention on Human Rights [ECHR]) gives a common, but very new type of legal framework to these responses. We could even say that Europe is the laboratory of constitutional theory because European integration required many of the traditional constitutional key concepts to be partly redefined.[29] (4) The European constitutional discourse, consisting of the constitutional discourses of the Member States and the constitutional discourse of the EU, is strongly interwoven, both in its judicial and its scholarly components, and is becoming more so each year. Comparative law became a standard part of domestic constitutional work, and mostly through the use of European materials (and only rarely non-European materials).

[27] Hermann Heller, *Staatslehre*, Leiden, Sijthoff 1934, 3–4. As a less ambitious rejection, simply stating that his own theory is not universal, see Ronald Dworkin, *Law's Empire*, London, Fontana 1986, 102–103.

[28] Cf. Otto Depenheuer – Christoph Grabenwarter (eds.), *Verfassungstheorie*, Tübingen, Mohr Siebeck 2010, which is (despite of its general title: 'Constitutional Theory') a theory of the German constitutional doctrine (with some passages on other countries); a thorough and interesting one, no doubt, but destined to advise only the German discourse. The same applies to a former British analysis, see Geoffrey Marshall, *Constitutional Theory*, Oxford, Clarendon Press 1971.

[29] Cf. the flourishing literature on the topic Anne Peters, *Elemente einer Theorie der Verfassung Europas*, Berlin, Duncker & Humblot 2001; Amaryllis Verhoeven, *The European Union in Search of a Democratic and Constitutional* Theory, The Hague, Kluwer Law International 2002; Peter Häberle, *Europäische Verfassungslehre*, Baden-Baden, Nomos ^{7}2011; John Erik Fossum – Agustín José Menéndez, *The Constitution's Gift. A Constitutional Theory for a Democratic European Union*, Lanham, Rowman & Littlefield 2011.

And finally, the geographic scope, is of course also influenced by the specific political vision behind the present theory (see above *1.2 The political nature of constitutional theory*). The purpose of the following chapters is also to provide tools or argumentative strategies for those constitutional lawyers who share this vision of a strong and unified Europe.