CONTENTS

List of tables page xvi
Preface xvii

1 Introduction 1
1.1 Constitutional theory as a language suggestion for a constitutional discourse 2
1.2 The political nature of constitutional theory 4
1.3 The role of historical and sociological knowledge 7
1.4 Why ‘European’? 9

PART I The grammar: the rules of constitutional reasoning 11

2 Constitutional reasoning in general 13
2.1 Constitutional reasoning and constitutional interpretation 17
2.2 Constitutional interpretation and statutory interpretation 20
2.3 The structure of arguments 23
2.4 The need for clarifying the methods of interpretation 24

3 A scheme of the specific methods of interpretation 28
3.1 The ordinary or technical meaning of the words 30
3.2 Systemic arguments: arguments from the legal context 32
CONTENTS

3.2.1 Contextual harmonising arguments 32
3.2.2 Referring to precedents which interpret the constitution 34
3.2.3 Interpreting the constitution in the light of doctrinal concepts and principles 40
3.2.4 Arguments from silence 40

3.3 Evaluating arguments: arguments from beyond the legal context 41
3.3.1 Relying on the objective purpose of the norm 41
3.3.1.1 Excursus on a special type of objective teleological interpretation: Dworkin 44
3.3.1.2 Objections to objective teleological arguments and how to respond to them 46
3.3.2 Relying on the intention of the constitution-maker (subjective teleological arguments) 47
3.3.3 Substantive (non-legal: moral, sociological, economic) arguments 51

3.4 Further arguments 53
3.4.1 Referring to scholarly works 53
3.4.2 Arguments from comparative law 54

3.5 The Relationship between the methods 57
3.6 Conclusion on the suggested method of constitutional interpretation 60

4 The conceptual system of constitutional law 62
4.1 Coherence 63
4.2 In defence of Begriffssprudenz 64
4.3 Typical mistakes when building a conceptual system of constitutional law 67

5 Dialects or local grammars: the style of constitutional reasoning in different European countries 70
5.1 Austria and Germany: focusing on the conceptual system 71
5.2 France and the UK: limited judicial review resulting in limited conceptual sophistication 75
## CONTENTS

5.3 Hungary and Spain: copying the German model after the end of the dictatorship 79

5.4 Is there a European style of constitutional reasoning? 82

### PART II  Suggested vocabulary as a patchwork historical collection of responses to different challenges 85

6 Sovereignty and European integration 91

6.1 Taming the internal aspect of sovereignty: compromise strategies in national constitutional laws 92

6.2 Taming the external aspect: challenges to international legal sovereignty 100

6.3 Member State answers to (and ignorance of) the constitutional challenge of EU membership 104

6.4 Finding a new compromise formula between national sovereignty and European integration 109

6.5 Conclusion as to how to use ‘sovereignty’ in today’s European constitutional discourse 116

7 The rule of law, fundamental rights and the terrorist challenge in Europe and elsewhere 117

7.1 The original challenge to which the response was the rule of law: absolutism 118

7.2 A challenge today: terrorism 122

7.2.1 The concept of security 122

7.2.2 The nature of the threat to security 124

7.2.3 The dilemma 124

7.2.3.1 Formal rule of law vs. security: the constitution as a general constraint on the fight against terrorism 125

7.2.3.2 Substantive rule of law (freedoms) vs. security: the taboo of torture 129

7.3 Old challenges vs. new challenges: rejecting the redefinition of the ‘rule of law’ 141
8 The constitution of Europe 143

8.1 The primary function: legal self-restraint or a list of taboos 143
  8.1.1 Different material concepts of the constitution 151
  8.1.2 Constituting vs. restraining? 153
  8.1.3 Rules of rationality and default responses 153

8.2 A secondary function: a symbol of the community 154
  8.2.1 Preambles 155
  8.2.2 The procedure of constitution-making? 157

8.3 Consequences of the two functions 159
  8.3.1 The amendment procedure and stability 159
  8.3.2 Typical content 164

8.4 Shall we use the expression the ‘constitution of the European Union’? 166

9 Democracy in Europe through parliamentarisation 171

9.1 Why does a successful EU have to be democratic? 172
  9.1.1 Genealogy: birth in the eighteenth century 173
  9.1.2 The success story of democracy or the strength of the claim for democracy 179
  9.1.3 Is output legitimacy an alternative? 183

9.2 Criteria for the well-functioning of democracy and their fulfilment in the EU 185
  9.2.1 A technical-procedural issue: direct or representative democracy 185
  9.2.2 Political freedoms and access to information on government 187
  9.2.3 Statehood 188
  9.2.4 Non-legal political and social infrastructure 188
    9.2.4.1 A homogeneous demos 188
    9.2.4.2 Political identity or the European ‘nation’ 191
    9.2.4.3 Democratic mentality 192
    9.2.4.4 Interested public opinion and media coverage 193
9.2.5 The direct link between election and responsibility: the effectiveness of popular will

9.2.5.1 ‘The current system is democratic enough, as we have democratic empowerment chains leading to the people’

9.2.5.2 ‘The EU has democratic origins, so its functioning must be democratic’

9.2.5.3 ‘We should rather make national parliaments stronger’

9.2.5.4 ‘It is practically impossible, as Member State politicians would not allow it’

9.3 Conclusion as to how to conceptualise democracy in Europe

10 Constitutional visions of the nation and multi-ethnic societies in Europe

10.1 How ethnic diversity becomes a challenge: the nation as a political and social phenomenon

10.1.1 Factors helping the formation of modern nations

10.1.1.1 Nationalism itself as a political ideology helping the formation of nations

10.1.1.2 The socio-psychological needs of individuals

10.1.1.2.1 The need to give a meaning to life after secularisation

10.1.1.2.2 The need for social cohesion in a dynamically changing world

10.1.1.3 Political and cultural compartmentalisation

10.1.1.3.1 Country-wide communication in the vernacular through linguistic unification

10.1.1.3.2 The modern bureaucratic state

10.1.1.3.3 Fragmentation of universalist structures

10.1.1.4 Political struggles and wars

10.1.1.5 Side-effects of scientific and cultural advancements: census (statistics), maps (geography), bilingual dictionaries (linguistics), museums (scientific history), sport (olympic games)
10.1.2 Antinomies of the nature of modern nations
10.1.2.1 Old vs. modern
10.1.2.2 Natural (ethnic, that is, based on ancestry or culture) vs. artificial (based on elite manipulation; or civic, that is, based on law and deliberate choice)
10.1.2.3 Based on historical facts vs. based on fabricated myths
10.1.2.4 Growing vs. fading
10.1.2.5 Constructive vs. destructive
10.1.2.6 Universal vs. local

10.2 Five different responses: constitutional visions of the nation
10.2.1 One state – one ethnic nation: assimilation or exclusion (vision no. I: classical ethnic nationalist vision)
10.2.2 One state – one multi-ethnic nation: the nation as an emotional alliance of different ethnies (vision no. II: Switzerland)
10.2.3 One state – several equal ethnic nations: the state as an empty shell without claiming an emotional connection between the ethnic communities (vision no. III: Belgium)
10.2.4 One state – a dominant ethnic nation and different minority ethnic groups (vision no. IV: most European states)
10.2.5 One state – no ethnic nation: the concept of a civic nation (vision no. V: United States)
10.2.6 Schedule on the constitutional visions of the Nation

10.3 Debated or borderline cases
10.3.1 Spain (mainly IV with elements of II and III, but historically also I)
10.3.2 Slovakia, Croatia and Romania (I and IV)
10.3.3 The United Kingdom (II, IV and V)
10.3.4 Hungary (mainly IV, with elements of I and V)
10.3.5 France and Poland (IV and V, but historically also I)

10.4 Excursus on secession: giving up the constitutional vision
10.5 The European union and the visions of a European political community 287

10.6 Conclusions as to the use of ‘nation’ in the European constitutional discourse 291

PART III Redundant vocabulary 293

11 Staatslehre as constitutional theory? 297

11.1 The key concept of the Staatslehre tradition: the Staat 298
  11.1.1 The German Staatslehre tradition 298
  11.1.2 Staatslehre and the concept of state in other countries 302

11.2 Arguments about the usefulness of Staatslehre today 306
  11.2.1 An object-defined discipline with a complex method 306
  11.2.2 Staatslehre as methodologically uncontrolled social science by lawyers 307
  11.2.3 Confusion about the key concept: the Staat 308
  11.2.4 Sociological importance or unimportance of the state in the age of globalisation 310
  11.2.5 Legal relevance or irrelevance 311
    11.2.5.1 Staatslehre as a conceptualisation of the separation of state and society 312
    11.2.5.2 Primacy of the state against the constitution 313

11.3 ‘Pre-legal state’ vs. ‘constitution’ as a key concept: the example of the state of emergency 314
  11.3.1 State-centred theories 314
    11.3.1.1 Classical state-centrism 315
    11.3.1.2 Moderate state-centred theories 318
  11.3.2 Constitution-centred theories 319
    11.3.2.1 The classical constitution-centrism 319
    11.3.2.2 The open version of constitutional-centrism 320
  11.3.3 Conclusions about the conceptualisation of state of emergency 321
11.4 Conclusion on the use of the conceptual framework of Staatslehre 323

12 The Stufenbaulehre as a basis for a constitutional theory? 325

12.1 The hierarchy of the legal order 326

12.1.1 The Stufenbaulehre as a construction of legal theory 327

12.1.2 Points of criticism 331

12.1.2.1 The basic norm 332

12.1.2.2 Blurring the difference between individual and general acts 340

12.1.2.3 The indefensibility of monism 341

12.1.2.4 The validity of a norm conditioned by one single other norm 342

12.1.2.5 Derivation of validity (existence) of a norm in extreme examples 345

12.1.2.6 Derivation of validity (existence) of a norm in the case of simple legislation 349

12.1.3 An(?)other hierarchy of legal order 353

12.2 Another attempt of the Pure Theory of Law to structure legal order 357

12.3 Excursus: the underlying ideology of the Stufenbaulehre 361

12.3.1 Autonomy of law 362

12.3.2 Separation of powers and acknowledging the legal nature of general internal policies of the administration 363

12.3.3 Secularised theological conceptions of hierarchy 364

12.4 Is the Pure Theory of Law still alive? 365

12.4.1 Summary of the argument 365

12.4.2 Perspectives of the Pure Theory of Law 366

12.4.3 The virtues of the Pure Theory of Law and whether they can be saved 366

13 Principles as norms logically distinct from rules? 368

13.1 What are principles? 368

13.1.1 Alexy’s theory 369

13.1.2 The objection: superfluous concept 371
13.1.3 Possible (counter-)objections against this purely rule-based paradigm 375

13.1.4 So what are principles? 377

13.2 How can principles be ascertained (recognised)? 380

13.3 What is the function of principles? 381

13.3.1 Heuristic function 381

13.3.2 Practical legal functions in applying the law 382

13.3.3 Meta-normative functions 386

13.3.4 Social functions 386

14 Public law–private law divide? 387

14.1 Historical roots 388

14.2 The distinction today 390

14.2.1 Public law and private law as concepts of legal theory 390

14.2.1.1 Interest theory 390

14.2.1.2 Subordination theory 390

14.2.1.3 Subject theory 392

14.2.1.4 Trusteeship theory 392

14.2.1.5 Disposition theory 393

14.2.1.6 Combined theories 393

14.2.2 Private law and public law as positive-law concepts 394

14.3 What could be the constitutional purpose behind the distinction? 396

14.4 Further possible meanings of public law and private law 397

14.5 Should we use the concepts ‘public law’ and ‘private law’ in European constitutional discourse? 398

PART IV Concluding remarks 401

Bibliography 403

Index 487