PART I

Realism and Idealism in Constitutionalism and the Rule of Law

Theory and History

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The Ideal and the Real in the Realm of Constitutionalism and the Rule of Law: An Introduction

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Introduction

Recent years have witnessed a multiplication of initiatives promoting constitutionalism and the rule of law. Both are understood, by many if not most, as necessary to create and sustain a just political order. If constitutionalism refers to a range of ideas and patterns of behaviour about how a government should be regulated in its powers in order to effectuate the fundamental principles of a political regime,[1] it is usually a national constitution that shapes constitutionalism in concrete legal terms. A more abstract definition, which applies not only to nation states but also to a post-national order, identifies constitutionalism as 'an overarching legal framework that determines the relationships of the different levels of law and the distribution of powers among their institutions'.[2]

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[1] Cf. K. E. Whittington, 'Constitutionalism' in K. E. Whittington, R. D. Kelemen and G. A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008), p. 281.

[2] N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010), p. 23. We use in this volume a rather material definition of a constitution, not necessarily confined to the single fundamental document – the Constitution with a capital C – that sets out the rules that regulate the government of a specific nation-state. Although national Constitutions get prime attention in most of the chapters in this volume, there is also reference to rules not encapsulated in a Constitution, but which nevertheless refer to a system of government: for example in the form of constitutional conventions, case law, (secondary) legislation, and soft law instruments of some sort, be they from national, supra- or international origin.

On the inter- and supra-national level, a rule of law discourse appears to prominently have taken on the task of expressing the norms and values that are deemed necessary for a just political order to exist.[3] And although the precise meaning of the phrase 'rule of law' is much debated,[4] nowadays there seems to be some agreement that it encompasses fundamental rights protection, judicial review, the division of powers, as well as a variety of governance requirements[5] – values that are in some form also legally protected by constitutional norms. In this sense these norms are, as Ginsburg and Versteeg put it in their contribution to this volume, 'the law that must rule, if the [rule of law] is to be achieved.' This can be taken to imply that constitutional norms tend to be of a more concrete and legal nature than the more process-oriented rule of law principles and instruments; constitutions function as a legal source for furthering the rule of law. Still, rule of law arrangements sometimes do have a concrete legal character and constitutional norms can be less than specific. In any event, the terms constitutionalism and rule of law are often used interchangeably.[6] But in whichever

[3] Often to be found in preambles, as in the *Statute of the Council of Europe*, the *European Convention on Human Rights*, the *Treaty on European Union*, the *Charter of Fundamental Rights of the European Union*, or the *Universal Declaration of Human Rights*. Also in national constitutions many times reference is being made to the rule of law or similar concepts, albeit in different meanings. See the examples in *European Commission for Democracy through Law* (Venice Commission), *Report on the Rule of Law*, Strasbourg, CDL-AD(2011)003rev, 8–9 April 2011 and the analysis in the report of the Netherlands Advisory Council for International Affairs, 'The Rule of Law: Safeguard for European Citizens and Foundation for European Cooperation' (No. 87, January 2014).

[4] R. H. Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse', *Columbia Law Review*, 97 (1997), 1–56; M. Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy', *Southern California Law Review*, 74 (2001), 1307–52, and B. Z. Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press, 2004), pp. 91–113. See also F. Venter, 'The Rule of Law as a Global Norm for Constitutionalism' in J. R. Silkenat, J. E. Hickey Jr. and P. D. Bairenboim (eds.), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer: Heidelberg, 2014), pp. 92–5.

[5] Cf. M. D. McCubbins, D. B. Rodriguez and B. R. Weingast, 'The Rule of Law Unplugged', *Emory Law Journal*, 59 (2010), 1455.

[6] L. Catá Becker, 'Theocratic Constitutionalism: An Introduction to a New Global Legal ordening', *Indiana Journal of Global Legal Studies*, 16 (2009), 99–101. Also quoted by Venter, 'The Rule of Law', p. 96. Both terms also play a role in efforts to translate the German (and Dutch) concept of the *Rechtsstaat*. Whereas in academic publications the translation 'constitutional state' is quite popular, the Treaty on European Union lists 'the rule of law' among the values of the Union as the equivalent and translation of 'Rechtsstaat'. On how the rule of law relates to conceptions of *Rechtsstaat* or *état de droit*, see: R. Grote, 'Rule of Law, Rechtsstaat and

way one balances or differentiates these notions, the key observation must be that they are inseparably conjoined, albeit more so in their ends than in their means: the core function of either concept is to channel, discipline, constrain, inform and, as Krygier puts it, 'temper' the exercise of power, not to serve it.[7]

Clearly no constitution is a machine 'that would go of itself',[8] but little is known about the mechanisms that facilitate (or hinder) constitutions and rule of law arrangements. What makes a 'living constitution',[9] or, under what conditions can a rule of law instrument be considered effective? Is a constitution that purposely takes a 'light touch' approach to actually imposing rule of law values more or less effective in putting the ideal behind those values into practice? Adams and Van der Schyff, in the context of the Dutch example, suggest that the answer may well depend on the degree of constitutional literacy in a society. And to what extent is a semi-legal or evolutionary approach, for example by building on transnational rule of law peer review procedures, conducive to development in this domain? Meuwese, in her chapter, argues that the community of states willing to engage in dialogue should indeed be considered as a potential source of authority in this context.

État de droit' in C. Starck (ed.), *Constitutionalism, Universalism and Democracy. A comparative analysis* (Baden-Baden: Nomos Verlag 1999), pp. 269–306; N. W. Barber, 'The *Rechtsstaat* and the Rule of Law', *University of Toronto Law Journal*, 53 (2003), 443–54, and M. Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), pp. 312–41.

[7] See the chapter by Krygier in this volume. See also M. Krygier, 'Rule of Law (and Rechtsstaat)' in J. R. Silkenat, J. E. Hickey Jr. and P. D. Bairenboim (eds.), *The Legal Doctrines*, p. 46, and M. Krygier, 'Rule of Law' in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook on Comparative Constitutional Law* (Oxford University Press, 2012), p. 245. Krygier points out that the rule of law can also be understood to deal with sources of social powers other than the state (family, companies), which is many times the realm of private law. Our focus is nevertheless on the public law realm, realising that public law and private law are getting more and more mixed (e.g., through *Drittwirkung* of fundamental rights). Cf. also Bingham: '[A]ll persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts'. T. Bingham, *The Rule of Law* (London: Penguin Books, 2010), p. 8.

[8] M. G. Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New Brunswick: Transaction Publishers 2006).

[9] The phrase living constitution was of course prominently used by B. Ackerman, 'The Living Constitution', *Harvard Law Review*, 120 (2007), 1737–812. See also D. A. Strauss, *The Living Constitution* (Oxford University Press, 2010).

Realising that full constitutional or rule of law compliance is like chasing a will-o'-the-wisp, in this volume we will close in on the aforementioned facilitating or hindering mechanisms by charting an underexplored tension. We are interested in the way constitutional norms and rule of law ideals or aspirations interact with the network of understandings and practices that inform and structure the concomitant political and social reality. The volume explores this tension through a combination of theoretical considerations and, mostly, case studies.[10] This approach provides an opportunity to uncover microfoundations of the mutually regulating relationship between the real and the ideal in this context.

The theme of this volume builds on work in the domains of political theory and philosophy and, if to a lesser extent, legal philosophy. In this introductory chapter, we will first, briefly and in general terms, present and discuss the distinction between idealism and realism, and the tension it inevitably engenders, as it is presented in political theory and legal philosophy. In doing so, we will break down the strict separation between positive and normative theory and show how the positive and the normative, a distinction that relates to the real and the ideal, are structurally related. In the following two sections we will then consider how this tension-fraught relationship presents itself in the constitutional and rule of law realm and can be used for our aims. Finally, we will put flesh on the bones of this volume by presenting and connecting its different contributions, and by introducing the structure of this volume. Given the setup of this introductory chapter, the way the terms that are central to this volume – realism and idealism – are deployed, will take shape as our discussion unfolds.

Positive and normative political theory

Traditionally, practical domains of inquiry are subdivided into two categories, according to their purpose and method: *positive* theory and

[10] Note that the aim is not to chart constitutional or rule of law *compliance* or implementation, although some of the chapters may shed a light on the conditions or mechanisms that either support or hinder constitutional compliance. See on this F. Schauer, 'Comparative Constitutional Compliance: Notes towards a Research Agenda' in M. Adams and J. A. Bomhoff (eds.), *Practice and Theory in Comparative Law* (Cambridge University Press, 2012), pp. 212–29.

normative theory.[11] In the domain of political theory, where the distinction between these two types of inquiry is generally acknowledged, positive political theory (often called political science) concerns the study of governments, public policies and political processes, systems and behaviour. Broadly speaking, positive political theory aims first and foremost to describe its objects, explain why they are the way they are, and how they (and their consequences) are expected to persist or change in the future. It includes such methods as literature review, document analysis, behavioural experiments and observations, survey research and interviewing, statistical analysis, and modelling and simulations. Normative political theory (frequently called political philosophy)[12] approaches the same objects from a normative point of view. Not only does it aim to describe its objects, it also wants to evaluate, criticise or justify the way they are or have come about, provide a picture of what they ought to be and possibly provide suggestions or prescriptions on how to accomplish this prospect. The methods used are mostly hermeneutic and interpretative, with an emphasis on literature review. Normative political theory, then, does not primarily try to describe or explain how our actual political world works; it rather aims to provide compelling reasons in favour of a desirable or ideal world.[13]

The distinction between positive and normative theory is also known in the field of law. One of the best-known proponents of a descriptive approach to law is, of course, Hans Kelsen. His 'pure theory of law' (*Reine Rechtslehre*) is the methodological foundation of a type of legal scholarship that aspires to be free of what Kelsen calls ideology; the aim is to describe the law *as it is*, not *as it ought to be*.[14] Normative theories of law steer a different course, and explicitly involve evaluative and prescriptive

[11] On this S. Braspenning, *Normative Democratic Theory and the Realities of Public Moral Disagreement* (Brussels: UPA 2012), pp. 11–13.

[12] See R. Goodin, P. Pettit and T. Pogge, *A Companion to Contemporary Political Philosophy* (Oxford: Blackwell, 2007), p. xvi. We here use normative political theory and political philosophy as synonyms.

[13] Z. Stemplowska, 'What's Ideal About Ideal Theory?', *Political Studies Review*, 10 (2008), 327–8.

[14] H. Kelsen, *Reine Rechtlehre (Mit einem Anhang: Das Problem der Gerechtigkeit* (Wien: Verlag Franz Deuticke, 1976 (unchanged from the 1961 (second) edition): 'Der Haupteinwand, der gegen die Naturrechtslehre im allgemeinen zu erheben ist: dass aus dem Sein kein Sollen, aus Tatsachen keine normen gefolgert werden können.' (p. 409). Kelsen's critique is first and foremost directed at theories of natural law, but is in our opinion not restricted to such theories.

questions:[15] What ought to be the sources of sovereignty and legitimacy? Which procedures should be followed? How should the rulers and the ruled act publicly and privately? And how should these two spheres of acting be distinguished?

Positive and normative theory, and the distinction between 'is' and 'ought', are traditionally understood as separate ontological domains that cannot be reduced to one another, and this of course also holds for *statements* concerning what 'is' and what 'ought' to be.[16] This dichotomy, however, is untenable, because even descriptive accounts of the objects of political science or legal scholarship are unavoidably interpretative and evaluative. '[T]he evaluations of the theorist himself are an indispensable and decisive component in the selection or formation of any concepts for use in description of such aspects of human affairs as law and legal order.'[17] Indeed, as John Finnis reminds his readers, law 'does not come neatly demarcated from other features of social life and practice'.[18] The descriptive theorist is therefore always in the business of making judgements of importance and significance in his description of law. If someone sees the ideal of law as pertaining to, for example creating a stable social order – as H. L. A. Hart does[19] – then such a view about the purpose of law will inevitably enter one's descriptive concept of law, even to the point of controlling it.[20]

[15] See the work by R. Dworkin and J. Finnis for example. R. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978); R. Dworkin *Law's Empire* (London: Fontana Press, 1986) and J. Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980). More general normative theories, like John Rawls's theory of justice, are usually seen as contributions to political philosophy, not to legal scholarship. The line between these different disciplinary approaches is however not always easy to draw.

[16] As is well known, already Hume famously argued that the latter cannot *logically* be derived from the former. See *A Treatise of Human Nature*, see especially book III, part I, section I.

[17] Finnis, *Natural Law*, p. 16. [18] *Ibid.*, p. 4.

[19] H. L. A. Hart, *The Concept of Law* (Oxford University Press, 1961), p. 78 ff. (this feature of law pertaining to social stability seems also part and parcel of Hart's 'minimum content of natural law'). Finnis, *Natural Law*, pp. 6–7.

[20] Admittedly, the 'theory-ladenness of observation' does not make the distinction between is and ought (or fact and value) in all circumstances useless. For even though some distinctions may be inaccurate or problematic at a deeper theoretical level (the level we are focusing at here), this does not necessarily prevent one from making them useful for some contexts or uses. See, e.g., H. Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Cambridge, MA: Harvard University Press, 2002) and P. A. Railton, *Facts, Values, and Norms: Essays toward a Morality of Consequence*

The complex relationship between positive and normative theory can be illustrated by turning to the theories of Carl Schmitt and John Rawls and the way they employ the notion of political possibility – this possibility is relevant for constitutional norms and rule of law arrangements since it is what they aim to regulate too.[21] For Schmitt the political is best seen as polemical in the full sense of the word. More concretely, Schmitt has infamously stated that 'the specific political distinction to which political actions and motives can be reduced is that between friend and enemy.'[22] This distinction 'denotes the utmost degree of intensity of a union or separation, of an association or dissociation'[23] and it 'is the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping.'[24] Political possibility is for Schmitt therefore always understood as the possibility of the extreme case: 'The ever-present possibility of conflict must always be kept in mind. (. . .) For to the enemy concept belongs the ever-present possibility of combat. (. . .) The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing. War follows from enmity. War is the existential negation of the enemy. It is the most extreme consequence of enmity.'[25] Interestingly, although building on an *a priori* concept of man as being evil,[26] Schmitt clearly indicates that his account of what makes politics possible, is nevertheless intended to be a *descriptive* account of reality: 'The concern here is neither with abstractions nor with normative ideals, but with inherent reality and the real possibility of [the friend-enemy distinction].'[27] Realism, from this point of view, refers to an attitude of the world that focuses

(Cambridge University Press, 2003). Also Braspenning, *Normative Democratic Theory*, p. 11.

[21] See Braspenning, *Normative Democratic Theory*, pp. 9–11.

[22] C. Schmitt, *The Concept of the Political* (University of Chicago Press, 1996), translation based on the 1932 edition of *Der Begriff des Politischen*, p. 26.

[23] *Ibid.* [24] *Ibid.*, p. 29. [25] *Ibid.*, pp. 32–3.

[26] See Schmitt's 'remarkable and, for many, certainly disquieting diagnosis that all *genuine* political theories presuppose man to be evil; i.e., by no means an unproblematic but a dangerous and dynamic being.' *Ibid.*, p. 61, italics added.

[27] Schmitt, *The Concept of*, p. 28. As a result of this position, law may create order, but not trust between people. We now know how Schmitt's idea of political possibility and the friend-enemy grouping has been materialised through his position as the prime political thinker of the *Third Reich*.

on its most salient dimensions, whether they conform to our preferences or not;[28] an attitude which gives priority to politics over morality.[29]

Rawls also writes about political possibility, but in contrast to Schmitt, his aim is explicitly normative. When expounding his idea of justice as fairness, Rawls distinguishes four roles that political philosophy or theory may have as part of a society's public political culture. One of these roles is exploration. Rawls refers to the exploratory idea of political philosophy as 'realistically utopian' and asserts that as such it plays a central role in 'probing the limits of practicable political possibility'.[30] More specifically, in Rawls's view this probing mainly consists of tracking those 'reasonably favourable but still possible historical conditions that would allow at least a decent political order and that are allowed by the laws and tendencies of the social world'.[31] Yet it is unclear exactly how realistic these utopian ideas and ideals can become, and Rawls himself, his efforts to defend their practicability notwithstanding,[32] remains fairly vague: '[T]he limits of the possible are not given by the actual, for we can to a greater extent change political and social institutions, and much else.'[33] And he also states that his theory 'probes the limits of the realistically practicable, that is, how far in our world (given its laws and tendencies) a democratic regime can attain complete realisation of its appropriate political values – democratic perfection, if you like.'[34] Already in his *Theory of Justice*, Rawls was aware of the limited nature of the usefulness of his theory for our non-ideal world – especially with regard to his well-known two principles of justice and their related priority rules. 'The drawback of the general conception of justice is that it lacks the definite structure of the two principles in serial order. In more extreme and tangled instances of non-ideal theory there may be no alternative to it. At some point the priority of rules for non-ideal cases

[28] See D. Bell, 'Under an Empty Sky – Realism and Political Theory' in D. Bell (ed.), *Political Thought and International Relations. Variations on a Realist Theme* (Oxford University Press, 2008), p. 1.

[29] B. Williams, 'Realism and Moralism in Political Theory' in B. Williams, *In the Beginning Was the Deed; Realism in Moral and Political Theory* (Princeton University Press, 2005), p. 2. Although Schmitt was notoriously critical of the institutional practices of liberal politics, Bell rightly points out that realism is not necessarily antithetical to liberalism. See Bell, 'Under an Empty', p. 12.

[30] J. Rawls, *Justice as Fairness* (Cambridge, MA: Harvard University Press, 2001), p. 4.

[31] *Ibid.*

[32] See also J. Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), first published in 1993, pp. lix–lx.

[33] *Ibid.*, p. 5. [34] *Ibid.*, p. 13 (italics added).

will fail; and indeed, we may be able to find no satisfactory answer at all. But we must try to postpone the day of reckoning as long as possible, and try to arrange society so that it never comes.'[35] Rawls, so it turns out, was aware of the substantial but nevertheless limited use of his normative theory in non-ideal circumstances, but this did not drive him to cynicism. Instead he clings on to his hope for a just and fair society, building on man as being to some extent reasonable,[36] and gives some priority to morality in political reasoning.[37]

This *prima facie* comparison of Schmitt and Rawls confirms that although views on meta-theoretical political issues revolve around typical concepts such as political possibility, the meaning of these concepts is informed by substantive views of the political itself, which in turn are influenced by an image of man as being either evil or reasonable. And while theories like Rawls's prioritise morality over politics, they too derive a part of their purpose from what is considered to be politically or realistically possible (and from a picture or representation of what has not or not fully been realised).[38] Moreover, both Rawls and Schmitt think that only by exploring the limits of what seems realistically possible in political terms can there be any hope of making sense of what the concept of the political truly entails as a practical concept, which is highly dependent on particular circumstances. This shared insight can and

[35] *Ibid.*

[36] See also the Introduction to the 2005 edition of Rawls, *Political Liberalism*, first published in 1993, almost a quarter century after *A Theory of Justice:* 'The wars of this century with their extreme violence and increasing destructiveness, culminating in the manic evil of the Holocaust, raise in an acute way the question whether political relations must be governed by power and coercion alone. If a reasonably just society that subordinates power to its aims is not possible and people are largely amoral, if not incurably cynical and self-centered, one might ask with Kant whether it is worthwhile for human beings to live on the earth. We must start with the assumption that a reasonably just political society is possible, and for it to be possible, human beings must have a moral nature, not of course a perfect such nature, yet one that can understand, act on, and be sufficiently moved by a reasonable political conception of right and justice to support a society guided by its ideals and principles. *Theory* [*of Justice*] and PL [*Political Liberalism*] try to sketch what the more reasonable conceptions of justice for a democratic regime are and to present a candidate for the most reasonable. They also consider how citizens need to be conceived to construct [. . .] those more reasonable conceptions, and what their moral psychology has to be to support a reasonably just political society over time. The focus on these questions no doubt explains in part what seems to many readers the abstract and unworldly character of these texts. I do not apologize for that.' Rawls, *Political Liberalism*, p. lx.

[37] Williams, 'Realism and Moralism', p. 2.

[38] Similar: D. Runciman, 'Political Theory and Real Politics in the Age of the Internet', *the Journal of Political Philosophy*, 24 (2016).