

Preliminary Draft

The Guardian of the Distinction:

constitutions as an instrument to protect the differences between law and politics

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I. Introduction

The inflationary use of the terms constitution and constitutionalism has led to more and more irritation about their meaning.¹ The terms have become the more uncertain the more they seem to dwell in the twilight between description and justification as well as between different legal, political or even moral claims.² But the inflation may also express a legitimate demand for a more general framework to describe a rapidly developing phenomenon. The following contribution tries to work with the assumption that even an open understanding of constitutionalism has to interpret it as an institutional phenomenon that links law and politics without completely accommodating the differences between both. Constitutionalism connects law and politics in order to keep both apart from each other. If this is correct, many recent phenomena of constitutionalism may be seen rather as a problem than as a solution. This has to be developed on a conceptual (II.), and an institutional (III.) level especially with regard to phenomena beyond the state (IV.).

II. Concepts

1. A TENTATIVE APPROACH

The locus of constitutionalism lies at the intersection of law and politics. Every theory of constitutionalism has to take both elements into account and apply them in a way that is open for institutional variation. Disciplinary myopias tend to lead to an over-emphasis of one and the negligence of the other of the two elements: Lawyers look at a constitution as a piece of law, political scientist and politicians may like to call it with Franklin Roosevelt “a layman’s document,

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¹ R Wahl, *Konstitutionalisierung – Leitbegriff oder Allerweltsbegriff*, Festschrift W Brohm (2002), 191-207:

² P Dobner/M Loughlin (eds.), *The Twilight of Constitutionalism* (2009).

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not a lawyer's contract".³ A valid constitutional theory has to avoid both kinds of one-sidedness. We talk about the existence of a "constitution" when we have achieved a certain degree of institutionalized integration of law and politics in a given polity. Criteria to define when exactly this is the case are contested (eg with regard to the state of the European integration) though we have a strong intuition that this is regularly the case in liberal-democratic states. With regard to other political entities we, therefore, talk about a process, of "constitutionalization". Any reduction of the institution or the process to either law or politics is not satisfying. The first one reduces constitutionalism to the protection of rights.⁴ The second one reduces it to the organization of a legislator.⁵ Both miss the interesting point of the phenomenon, the question how law and politics can or should at the same time be coupled and differentiated. We may define constitution tentatively as an institutional setting that simultaneously guarantees the legitimacy of the legal order through political action and the organization of politics through legally formal procedures. The core problem of constitutional theory lies in the development of a satisfying model of the relationship between both.

2. THE MEANING OF LAW IN CONSTITUTIONALISM

For the problems of constitutional theory a definition of law is not as difficult as it may be for analytical legal theory.⁶ We refer to rules that bind members of a political community and whose application may be controlled by courts as *law*. One core element of constitutionalism is the legalization of political power, the long historical process in which political rules and public administrations became subjected to the rules they had made, controlled by independent bodies like courts. There is neither any constitutional order without this process nor any in which this process has been fully completed. Even liberal democracies tend to introduce exemptions from an independent legal control of public power. Though these exemptions are regularly based on law itself they remain

³ FD Roosevelt, 'Address on Constitution Day, Washington D.C. (17.9.1937)', in FD Roosevelt and SI Rosenman (eds), *The Public Papers and Addresses of Franklin D. Roosevelt* (1938), 362.

⁴ Example: EU Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, (1991).

⁵ Examples: R Bellamy, *Political Constitutionalism* (2007).

⁶ But it may be a flaw of contemporary legal theory to look for a "concept of law" at all: KE Culver/M Giudice, *Legality's Border* (2010),

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exemptions to constitutionalism. In this context, it is important to distinguish two phenomena: statutory exemptions from standard judicial review, and the lack of constitutional judicial review of the legislator. The first one is a necessary element of constitutionalism, without it there is no legalization of political action. The second one is one particular form of constitutionalism.

3. THE MEANING OF (DEMOCRATIC) POLITICS IN CONSTITUTIONALISM

Under *politics* we will simply understand any form of organized collective action. The aspect of collectiveness underlines that politics requires a qualified community of individuals. The aspect of action stresses that politics has to create alternatives.⁷ Political action is only thinkable, where more than one legitimate decision is possible – this is an obvious contradiction to the rationality of legal decision-making.⁸ The necessary qualifications for the existence of a political community are contested, e.g. between liberals, communitarians and discourse theorists.⁹ But beyond this debate it seems unavoidable that there is a certain bond between individuals in order to create a political community – and constitutionalism. More important for our purposes than the problem of the nature of this political bond is the fact that the construction of political communities is not independent from the state of the law. There is no “given” political community, no state or other polity that is just there, and whose power is limited afterwards by law.¹⁰ Such a reconstruction may describe the constitutional history of some (though not of all) constitutional polities.¹¹ In any case, it fails to grasp the concept of a constitutional order. Rather, law helps to define how the political process can be conceived of, to define who are the political actors and in which institutional forms politics comes into action. Law constitutes a political process in which, vice versa, the production of law is politicized. The second core element of constitutionalism is the politicization of law-

⁷ Hannah Arendt, *Was ist Politik* (2010).

⁸ This contradiction remains independent from the question if one adheres to a right-answer model of law or if one believes in its indeterminacy. In any case, the existence of alternative solutions creates a problem for the legal discourse while it is a legitimizing factor for politics.

⁹ Compare Habermas' attempt to position himself in between liberalism and communitarianism: J Habermas, *Faktizität und Geltung* (1993).

¹⁰ Though this is a very common idea not only, but very explicitly in the German state-tradition, for a Anglo-Saxon reception, M Loughlin, *In Defence of Staatslehre*, *Der Staat* 48 (2009), 1-28.

¹¹ It might be historically correct for German constitutional history, but not for the US.

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making, the institutional connection between the legal order and a political process. Like the first element this second element it incomplete in every constitutional polity. Parts of every legal order remain implicitly or explicitly disconnected from the political process, private law is the classical though not unproblematic example for that. The theory of societal constitutionalism denies such a privileged relationship of constitutionalism with or only with politics.¹² But at least as long as political communities claim to set rules for potentially all elements of society, from economics to ecology, it seems more plausible to stick to a model of political constitutionalism that may be differentiated with regard to phenomena of societal self-regulation on a second level.¹³ Constitutions are better described as political and legal institutions than as a part of the economic or any other sphere of society.

Do we have to identify “politics” with “democracy” in constitutional theory? No, there is non-democratic constitutionalism. Political orders like the German Kaiserreich after 1871 or contemporary Iran (before the last Presidential elections) are built on dual a system of political legitimacy,¹⁴ but they know political procedures that are constituted as well as bound by law. Despite these phenomena, there is a particular affiliation between democracy and constitutionalism: The institutional design of democratic governance requires legal rules. Without them the identification of democratic membership or the organization of democratic procedures are not possible.¹⁵ Without a legal definition of egalitarian rights to participation and to public opposition the democratic legitimacy of political decisions cannot be guaranteed. There is no democracy beyond constitutionalism, and there is no constitutionalism without at least one democratic element, as we can observe in mixed constitutional orders like the mentioned. There is no dignity of legislation without a legal order that defines rules about who the legislator is and what he is supposed to do. These are constitutional rules though not necessarily rules under constitutional review.

¹² G Teubner, *Societal Constitutionalism*, Storr Lectures, Yale Law School 2003/2004; D Sciulli, *Theory of societal constitutionalism* (1992); for a critique see D Grimm, in: *Festschrift Roman Herzog*, 2009, XXX

¹³ And may be, therefore, better treated as a problem of administrative law and theory.

¹⁴ Monarchism and democracy in the case of the Kaiserreich, Islamism and democracy in the case of Iran.

¹⁵ Most radically analysed by H Kelsen, *Allgemeine Staatslehre* (1925), 312-316.

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The common idea that constitutionalism is just an instrument that limits or tames the political process misses the structure of democratic constitutionalism. And it is important that this foundational or political aspect of constitutions does not depend on a revolutionary event that creates a completely new political order.

4. LEGITIMACY BY DIFFERENCE: NO ZERO-SUM GAME BETWEEN LAW AND POLITICS in constitutionalism

Legalization and politicization may unfold in antagonistic directions.¹⁶ Such contradictions have been known to constitutional theory for a long time, and they have occupied up to the present day much academic attention—for instance regarding the question of democratic legitimacy of constitutional courts.¹⁷ As we mentioned, legal academic literature frequently attempts to resolve this antagonism in favour of one of the two elements.¹⁸ The current debate on constitutionalism on the international level seems to privilege juridification over politicisation, while important parts of the Weimar constitutional discourse applied an existentialist notion of politics to prove the priority of politics over law.¹⁹ Something similar same may be said about parts of critical American constitutional theory.²⁰

The supposition that democratisation and juridification necessarily clash at one another's expense underlies the thesis of a zero-sum game between law and politics. In contrast, one may point out that western legal systems have long been familiar with the antagonism of two forms of law: one driven by politics and one that arose autonomously. This dualism, which gives courts the possibility to create law and legislatures the general power to correct the courts, is necessary for the adequate functioning of the legal and political

¹⁶C Möllers, 'Steps to a Tripartite Model of Multilevel Government', Jean Monnet Working Paper 5 (2003), sub 1.2., available at www.jeanmonnetprogram.org.

¹⁷For the question of counter-majoritarian difficulty JB Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law', (1893) 7 Harvard International Law Review 129 at 137; A Bickel, *The Least Dangerous Branch* (1962).

¹⁸See C Schmitt's attempt to construe a contradiction between rule of law and democracy, and between law and politics, in *Verfassungslehre* (1927).

¹⁹R Smend, *Verfassung und Verfassungsrecht* (1928); C Schmitt, *Der Begriff des Politischen* (2nd ed. 1932).

²⁰Larry Kramer, *The People Themselves* (2004).

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systems.²¹ Legal form and democratic politicization may reciprocally reinforce each other.²² In contrast, exaggerations in the juridification of the political process lead to both practical malfunctions and normative deficits in legitimacy. For example, political considerations in court reasoning question the legitimacy of the political system that exerts influence on the court and the legitimacy of the legal system that submits itself to such an influence. A too extensive constitutional adjudication leads to an over-juridification of political processes that overuse constitutional texts. This diminishes the normative power of a constitution and, at the same time, calls into question the ability of the political system to function properly.

Justices that vote in court with their political faction or Members of Parliament that limit their political action to the implementation of constitutional values connect law and politics – though in a way that does not respect the autonomy of both spheres. The scope of this autonomy is not easily to be defined. In institutional terms, the autonomy of law depends on the independence of judicial bodies, while the autonomy of a political process is located in an space of arbitrary decision-making within the legislative process. Both discourses, legal reasoning in a judicial procedure and the political deliberation in the legislative organ are open for rational arguments. But their rationalities are different and it is an important function of constitutionalism to protect the difference between these different rationalities, as they mutually rely on each other: the political decision on the respect for a rule-bound procedure, the judicial review on a reference to a political decision – or its politically legitimate alternative. One of the problems of constitutional judicial review is its potential to homogenize the differences between political deliberation and judicial reasoning, and, thereby, to undermine the working of the constitutional structure.

5. RATIONALITY AND ARBITRARINESS IN CONSTITUTIONAL ORDERS

Though rarely made explicit, the distinction between *ratio* and *voluntas* between rationality and arbitrariness is one of the important subtexts of

²¹H Hofmann, *Das Recht des Rechts, das Recht der Herrschaft und die Einheit der Verfassung* (1998) 40 et seq.

²²C Möllers, *Die drei Gewalten* (2009), 71-89.

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constitutional theory. Regularly, the meaning of this distinction is obvious: Constitutional law rationalizes the arbitrariness of the political process. The principle of proportionality is the epitome of this assumption: In its most elaborate version it connects Weberian instrumental rationality²³ with the balancing of values.²⁴ It belongs to the sweeping expertocratic claim of the legal profession to master both kinds of rationality. But the simple assignment of rationality to law and of arbitrariness to politics is not plausible. It is another way to privilege juridification over politicisation or, in methodological terms, to unduly restrict constitutional discourse to the solution of legal cases. One of the remarkable implication of a broad use of the proportionality test is that it not only tends to dissolve all the differences between legal and political reasoning, it may also lead to a concept of both discourses that is neither legal nor political, but philosophical:²⁵ Politics develops into the process of democratic deliberation or public reasoning, law develops from an art of interpretation to a philosophical concept of rational justification. The differing and antagonistic discourses of majoritarian politics, understood as the expression of differing interests and wills, as well as the jurisprudential techniques of decision-making develop into the one and only rational philosophical practice.

Such an approach has neither normative respect nor any cognitive explanation for the amazing differences we can still observe between different legal orders in the field of constitutional review. The theories applied by different courts cannot be described by one rational framework.²⁶ There are many practical-institutional reasons for these differences (some of them will be mentioned under III), they may also have to do with the idea of self-determination that only makes sense if there is any justification for differences that cannot be pressed in a homogenous philosophical framework. The same is true for the concept of rights that is deprived of any spontaneous or subjective element, when it is identified with “values” as it is usual the case in systems with a strong review of proportionality. Again it seems is a central task of constitutional theory to

²³ Is the means appropriate for the aim?

²⁴ Is there an adequate balance between the different normative orientations?

²⁵ M Kumm, The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Justification, *Law & Ethics of Human Rights* 4(2010), 141-175 (150, 154).

²⁶ D Robertson, *The Judge as Political Theorist* (2010).

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protect the differences between the rationalities of political and legal decision-making procedures. One of the rational qualities of the democratic process is, as we have learned from the American pragmatist tradition, to create space for change and adaptation to changing circumstances.²⁷ The generation of alternatives may serve as rationalizing element. This function cannot be fulfilled by judicial reasoning.

III. Institutional Issues

1. NECESSARY INSTITUTIONAL ELEMENTS OF CONSTITUTIONS?

There are constitutional orders without constitutional judicial review of legislation and without written constitutional documents. The English constitutional tradition is, on the one hand, a helpful reminder not to be too demanding with regard to catalogues of “necessary” elements of constitutionalism. The English governmental system is neither anarchic nor despotic, and it has probably evolved more slowly than many other systems with a written constitution and constitutional review. The particularity of this tradition lies not in the absence of constitutionalism, but in the relatively low degree of formal legalization of the political process, at least relatively to post-1945 standards. This seems only possible under the condition of a relatively high informal consensus about an appropriate behaviour of participants in the political process. From this angle, the English constitutional tradition is even more demanding to its institutions than many systems with constitutional review. We can learn from this that any de-contextualized reference to certain institutional features is only of limited help to understand how constitutionalism works. Two further insights may be drawn from the fact that we have to be careful to identify “necessary” elements of constitutionalism. The first concerns the meaning and function of constitutional documents, of written constitutions, the second addresses the idea of a hierarchy of norms.

Written Constitutions

²⁷ Eg J Dewey, *The Public and its problems* (1927).

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We have to be quite careful to interpret the fact that a polity has decided to give itself a written constitution:²⁸ On the one hand such a document seems to be an indicator of a higher degree of legalization of the political process: it is a codification that can be used as an object of legal interpretation. On the other hand, constitutional documents often transport an explicitly political, even utopian contents. They codify a world to be made. The documentation of a constitution is, therefore, neither only an indicator of its legal nor of its political character, it is rather an indicator of a particular intensity of both, political and legal normative claims: The written documentation of the constitutional content has a formalising effect. The objectification of the constitution in one coherent, possibly short and generally understandable text constitutes the constitution as an autonomous piece of sense. This creates its specific political and legal normativity. Similar to a piece of art, its objective character enables it to portray potential contrast to “social reality”.²⁹ The objectification of the constitution in a text calls forth its symbolisation.³⁰ The function of the written form is not necessarily the fixation of a certain matter: The interpretation of the text obviously changes considerably over time and this change is by no means undesirable or unintended.³¹ However, the textual documentation of the constitution enables its political-utopian demand to become more independent from the current political or legal practice.

Hierarchy of Norms

The idea that there is a highest law, a *lex suprema*, in a given political order is older than modern Atlantic constitutionalism. But the concept of a modern system of a hierarchy of norms is much younger³², and the way in which it is implemented differs considerably between different constitutional orders. The way a hierarchy of norm is implemented has important implications for the

²⁸ J Gardner, Can there be a written constitution, Oxford Legal Studies Research Paper, 17/2009.

²⁹ N Luhmann, *Die Kunst der Gesellschaft* (1995) 229–30.

³⁰ ES Corwin, 'The Constitution as Instrument and as Symbol', 30 *American Political Science Review* 1071 at 1072–73 (1936).

³¹ In *McCulloch v Maryland* 17 US 4 (Wheat) 316 at 407 (1819) this is just the problem John Marshall refers to in writing the famous phrase: “In considering this question, then, we must never forget that it is a constitution we are expounding.”

³² The invention can be attributed to A Merkl *Die Lehre von der Rechtskraft entwickelt aus dem Rechtsbegriff* (1923).

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relationship between the legal and the political elements within a constitutional order. A strongly hierarchic concept of constitutionalism tends to monopolize the meaning of a constitution in the final interpreter of the constitutional text. But even in systems with a strong constitutional review, this top-down approach is incomplete and misses the way in which judicial review operates. The relevant statutory law has a considerable influence on the way in which constitutional rules are interpreted which, vice versa, will serve as the standard of constitutionality that is applied to the statute. That does, of course, not mean that there no unconstitutional statutes. But it means that we will not understand the mechanisms of constitutionalism when we limit our analysis to cases in which a court declared a statute unconstitutional. Even in systems with a system of strict constitutional review such cases remain exceptional. The process of statutory and constitutional interpretation does not move only in one direction; and the hierarchy of norms needs standards of interpretation that are informed of the state of statutory law and even by the way its handled by the executive.³³ The democratic legislator is the first interpreter of the constitution.³⁴

2. COURTS AND LEGISLATURES AS INSTITUTIONS

One of the still unsolved problems of constitutional theory lies in the analysis of organizational and procedural differences between legislating and adjudicating public bodies. Constitutional theory tends to describe courts as more rational and even more virtuous actors than legislators though it is far from clear why this should be the case. To be sure, there are differences between both institutions, most notably the lack of initiative on the side of courts and the necessity to provide reasons for a decision.³⁵ This makes courts more similar to independent executive agencies than to parliaments or governments, but it is important to see that judicial decision-making may well suffer from similar deficiencies like the other governmental branches: courts can be captured,

³³ This is an important point of constitutional pluralism, an analysis of the ECHR in this vein N Krisch, *Beyond Constitutionalism* (2010), Ch. 4. And it is also true for national constitutional systems: D Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, in: JL Dunoff (ed.), *Ruling the World?*, 2009, 326-355.

³⁴ P Kirchhof, Kirchhof, „Demokratischer Rechtsstaat – Staatsform der Zugehörigen“, in: J. Isensee/P. Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. IX (1997), § 221, para 77.

³⁵ It is remarkable that the wide-spread assumption in political theory that the legislator has to give reasons for political decisions has no institutional correspondence in constitutional law: the democratic legislator has no such legal duty.

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they can be overburdened, they can be corrupt, and they can be unjust. It is especially unclear if courts are able to cope with complex factual problems,³⁶ or with the consistent application of grand theoretical designs.³⁷ These insights do not argue against a strong role of courts in every constitutional structure, they just try to set a discourse straight that tends to apply certain forms of institutional critique rather to legislatures than to courts.

3. INSTITUTIONAL CONTEXTS OF RIGHTS

Many misunderstandings in the right's discourse stems from the fact that we do not always clarify if we talk about political, legal or moral claims when we refer to "rights". A standard critique of constitutional review points out that the decisions courts make with regard to the review of rights could be made better and more legitimate by the political process.³⁸ But even if this is correct with regard to the question of political legitimacy, the underlying concept of rights is regularly not made explicit. More concrete, the argument seems to assume that every right-based legal argument works as an optimizing reference to principles. This is the law as imagined by a legal philosopher. From a comparative point of view, this assumption is probably not correct. Different styles and methodologies in constitutional law may have effects on how to criticize or justify judicial review. There may be techniques of legal reasoning that cannot be performed as well by legislatures as they are performed by courts. Even if there are good reasons to criticize judicial review³⁹ these reasons may not enjoy the universality they often claim to have. And vice versa: Different models of rights as principles seem only to be appropriate descriptions of specific legal orders, be it an order that balances principles,⁴⁰ be

³⁶ A Vermeule, *Judging under Uncertainty* (2006).

³⁷ CR Sunstein, *One Case at a Time*, (1999), some, though exceptional, reservations against the argument in CR Sunstein, *Beyond Judicial Minimalism*, Harvard U Public Law and Legal Theory Working Paper 08-40.

³⁸ Eg J Waldron, *The Core of the Case against Judicial Review*, 115 Yale L. J. 1348 (2006).

³⁹ C Möllers, *Report on a Missing Debate: Why there is no counter-majoritarian difficulty in Germany*, paper on file with the author.

⁴⁰ R Alexy, *Theory of Constitutional Rights* (2nd ed. 2002) can be read as a methodological reflection of German constitutional jurisprudence, though it is safe to say that German constitutional law has reached a crisis of balancing that is even remarked by constitutional justices:

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it one that uses principled rights as “trumps”.⁴¹ These theories share a strong but quite one-dimensional idea of the relationship between law and politics in a constitutional order. They all neglect the differences between different legal methodologies as well as between the institutional contexts of rights. It seems quite implausible that a jurisprudence of rights that is confronted with an active political legislator, like in the German case, adheres to the same methods like one that does not have such a counter-part like in the case of the European Court of Human Rights.

IV. Constitutions beyond the state

1. GENERAL PROBLEMS

Do we have to abandon the idea of constitutionalism in order to build a conceptual framework for the development of international law? Even approaches that claim to do this cannot help but to care for the relation between law and politics.⁴² In addition to that, the rejection of state-bound categories regularly refers to a hermetic idea of statehood that has nothing got to with the heterogenous and diverse organization of many especially federal states in which political levels compete with each other and with private groups of law-makers. Perhaps it would be helpful to imagine India, not France as an adequate general model of state-constitutionalism in order to overcome too static ideas of “the state” and its constitution. In any case, the reference to law and politics seems to be abstract enough to be applied also to phenomena beyond the constitutional state. On the one hand it already seems safe to talk about elements of constitutionalization even on the international level as both can be observed: attempts to limit and legalize even consensual political actions of “sovereign” states – and the emergence of genuinely international political procedures be it within the structure of international organizations, be it between them.⁴³ On the other hand, it has to be conceded that the plurality of phenomena that are discussed under the heading of constitutionalism is more

⁴¹ R Dworkin, *Taking Rights Seriously* (1977), though making universalist claims, seems only to describe the U.S. American constitutional rights discourse.

⁴² N Krisch, *Beyond Constitutionalism* (2010), 89-102 wants to overcome constitutionalism in favour of pluralism, but applies an explicitly normative model with reference to “public autonomy”, another word for politics. “Beyond constitutionalism” is still a reference to nothing but constitutionalism.

⁴³ I Ley, *Opposition im Völkerrecht*, Manuscript 2011.

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diverse and less demanding than in the context of states or of the Europe: from merely technocratic models⁴⁴ that would seem odd in the context of democratic nation-states up to purely moralizing ideas that appeal to “humanity”.⁴⁵ This may be a reason for critical engagement but not one to give up constitutional semantics on the international level as an analytical tool even to describe deficiencies or setbacks. The fact that international law theory tends to deliver stories of triumph and progress or of fall and decline cannot be attributed to the language of constitutionalism.

2. EUROPE

If the connection of politics and law through constitutions is not a zero-sum game then there are reasons to believe that the European institutions lack both:⁴⁶ not only structures of democratic law-making but also suitable forms of juridification. In this way, the Council’s still arcane legislative techniques are neither legalised nor democratic. But this kind of critique argues on very high level given the fact that we discuss a non-state entity. Despite all recent setbacks the institutional development of the European integration since the Single European Act has been quite dramatic and the scepticism with regard to the application of categories like constitutionalism to phenomena like the EU seems to be belied by it. To be sure, the EU is a distinctive institution, in many regards very different from its member states. But is it really so different that we have to imagine a completely new language to describe how law and politics are intersected in it? Again, the more difficult task is to account for the political developments of constitutionalism, eg the emergence of a genuinely political process within the European Parliament and its impressive efforts to control the European executive. These are elements of European constitutionalism that are not easily described by lawyers.⁴⁷ Therefore, it may well be the case that any of the more recent elements of European constitutionalization will be ignored by them.

⁴⁴ This concerns especially the debate on “Governance”.

⁴⁵ A Peters, *Humanity as the A and Ω of Sovereignty*, *European Journal of International Law* 20 (2009), 513-544. To say humanity is the solution for the problems of constitutionalism, is like saying food is the solution for a famine.

⁴⁶ The pioneering character of Joseph Weiler’s work lies exactly in his approach to think legal procedures and political processes within one framework.

⁴⁷ But see D Curtin, *Executive Power in the European Union* (2009) Ch. 9.

V. Constitutional theory in the varieties of constitutionalism: Is constitutional theory normative?

Is there a common discourse of constitutional theory between lawyers and political scientists or between German, European and U.S.-American researchers? Though it seems possible that this kind of discourse is evolving we have to carefully assess if our general underlying assumptions are appropriate for more than one legal order and if they are of use to describe the political element of constitutionalism. There is another danger of missing internal tensions or even contradictions within a given constitutional system: The German Federal constitutional court applies a wide proportionality test but other elements of its methodology are quite legalistic and a-theoretical. The ECJ has a reputation for pushing European law to its limits, but it rarely acts as a constitutional court towards European organs and in most of its decisions it decides on textual arguments stemming from secondary law. It may be misleading to put such complex phenomena in an over-arching theoretical context. That means: Serious constitutional theory cannot work without serious constitutional comparison.

This leaves us with the question if constitutional theory should rather explain constitutionalism or develop normative frameworks for the right form of constitutionalism. Most legal constitutional theories claim more normative wisdom than the legal orders they want to analyse. There are at least two arguments against a strong normative claim of constitutional theory. The first more general point wonders about the methodology to develop such normative claims which probably will depend on prior descriptive results. The second, more specific, argument would ask about the status of normative theories within a democratic order. Much of the critique of judicial review may also address constitutional theory: Where is the legitimate mandate to tell a polity which are the best decisions to be taken when the dominant political paradigm, democracy, calls for openness and variability. Or: There might be also a “priority of democracy to constitutional theory.”